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STATE COMMISSION

THE TRUST COMPANY  
OF NEW YORK  
AND MANHATTAN  
CITY OF NEW YORK

NEW YORK STATE DISTRICT COURT  
DISTRICT OF MANHATTAN

January 1, 1940

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 25

THE UNITED STATES OF AMERICA AND INTER-  
STATE COMMERCE COMMISSION,

APPELLANTS,

VS.

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
STATE OF IOWA, ex rel. IOWA STATE COM-  
MERCE COMMISSION AND OMAHA  
CHAMBER OF COMMERCE.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

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(Caption Omitted)

3

(File Endorsement Omitted)

4

In the  
United States District Court for the Northern District  
of Illinois, Eastern Division

THE ROCK ISLAND MOTOR  
TRANSIT COMPANY,

Complainant,

vs.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COM-  
MISSION,

Defendants.

Civil Action No. 49-C-1005.

Complaint

(Filed June 20, 1949)

*To the Judges of the District Court of the United States,  
in and for the Northern District of Illinois, Eastern  
Division:*

Now comes The Rock Island Motor Transit Company and  
alleges as follows:

I

Complainant herein is The Rock Island Motor Transit  
Company, a corporation organized and existing under the  
laws of the State of Illinois.

5

II

This suit is brought under the provisions of an Act  
of Congress dated June 25, 1948, effective September 1, 1948  
(62 Stat. ....), Title 28 United States Code, Sections  
1336, 1398, 2284, 2321, 2322, 2324 and 2325, and the Inter-  
state Commerce Act and under other applicable Federal  
statutes, and the Fifth Amendment to the Constitution of  
the United States, to enjoin, set aside, annul, and suspend  
the report and order of the Interstate Commerce Commis-  
sion, entered April 11, 1949, in Dockets MC-F-445, *The  
Rock Island Motor Transit Company—Purchase—White  
Line Motor Freight Company Inc., et al.*; MC-F-2327, *The  
Rock Island Motor Transit Company—Purchase—J. H.  
Frederickson and D. H. Frederickson*; and No. MC-29130  
(formerly No. 49147, *The Rock Island Motor Transit Com-  
pany, Common Carrier Application*). The jurisdiction of

this Court rests upon the aforesaid statutes and its general equity jurisdiction. The United States of America and Interstate Commerce Commission are made defendants herein by authority of said statutes.

### III

Complainant herein is a common carrier by motor vehicle engaged in the transportation of property in interstate and intrastate commerce. As a common carrier by motor vehicle, it has been, for many years last past, and now is transporting property over the highways in interstate commerce in and between the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, Tennessee and Texas. It has its legal residence as well as its principal office at 139 West Van Buren Street, Chicago 5, Illinois. Its operating office is located at 402 Plymouth Building, Des Moines, Iowa. Its interstate business is conducted pursuant and subject to 6 the provisions of the Interstate Commerce Act, approved February 4, 1887 (24 Stat. 379), and acts amendatory thereof, including the Transportation Act, 1920 (41 Stat. 456), the Motor Carrier Act, 1935, also known as Part II of said Interstate Commerce Act (40 Stat. 543), and the Transportation Act, 1940 (54 Stat. 899-919). Complainant is a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad.

### IV

In 1937 complainant decided to enter the interstate motor carrier field, as a common carrier of freight, between Chicago, Illinois, and Omaha, Nebraska, and many intermediate points, large and small, including such points at Silvis, Moline and Rock Island, Illinois, and Davenport, Iowa City, Newton, Des Moines, Atlantic and Council Bluffs, Iowa, all of which points were and are now located upon the lines of railroad of Chicago, Rock Island and Pacific Railroad Company. Toward that end complainant proposed to acquire the operating rights of White Line Motor Freight Company and White Line Trucking Company of Des Moines, Iowa (herein sometimes referred to as "White Line companies"), which were affiliated trucking companies, and which at that time and for some time prior thereto were and had been engaged as interstate motor carriers of freight between the aforesaid points. Complainant thereupon entered into negotiations to acquire

the operating rights of the White Line companies between Omaha, Nebraska, and Chicago, Illinois, together with substantially all of their physical properties used and useful in the conduct of a common carrier trucking business. As a result of these negotiations agreements were duly executed to give effect to said proposed acquisition. This transaction was and would be subject to the approval

7 of the Interstate Commerce Commission under the provisions of the Motor Carrier Act of 1935. The transaction involved a purchase price of \$59,400.00, for which complainant would acquire not only the interstate operating rights of the White Line companies, but intrastate rights as well, and certain of their physical properties, including trucks, shop and office equipment and supplies, and good will, all needful in the conduct of a substantial trucking business. Upon consummation of the transaction and in furtherance of complainant's decision to engage in the trucking business as an interstate common carrier, complainant proposed the following methods of operation: (1) a coordinated rail-motor service at rail rates, auxiliary to existing railway service of Chicago, Rock Island and Pacific Railroad; (2) a motor carrier service, in substitution of rail service, at rail rates, such motor service being auxiliary to the rail service; and (3) a motor service at rates comparable to those offered by competing highway carriers. These methods of operation were described at length in proceedings before the Interstate Commerce Commission upon complainant's application for approval of the transaction.

### V

In October of 1937 complainant filed its application with the Interstate Commerce Commission for authority to acquire the aforesaid rights and certain properties of the White Line Motor Freight Company, Inc., and White Line Trucking Company, applicable to routes between Chicago, Illinois, and Omaha, Nebraska, with segments extending to Cedar Rapids and Muscatine, Iowa, as shown by the map attached as Exhibit 1. The application was docketed as MC-F-445 (and is herein sometimes referred to as "White Line proceeding"), and the hearing thereon held on November 19, 1937, before Examiner John Higgins of the  
8 Interstate Commerce Commission. A report and order were recommended by Examiner Higgins on February 12, 1938, a copy being attached hereto as Exhibit 2.

This proposed report recommended approval of the transaction subject to the following conditions:

*"Provided, however, that the authority herein granted (1) is subject to the limitation that applicant shall not render service from or to, or interchange traffic at, any point other than a station on the lines of The Chicago, Rock Island and Pacific Railway Company, and shall be subject to such further limitations as it may hereafter be further necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition; (2) that no truck service shall be conducted at other than rail rates; (3) that no contract or irregular route operations shall be conducted pursuant to the rights acquired, and (4) that neither applicant nor the railroad, their directors, officers, or agents, shall directly or indirectly vote the stock of White Line Transfer & Storage Company, without specific authority from this Commission."*

Following the issuance of this report, Complainant filed exceptions to the Examiner's recommended report and order in which particular exception was addressed to the imposition of condition (2), that no truck service should be performed at other than rail rates. In the conclusion of its exceptions complainant stated at page 20 thereof:

*"Applicant represents that the recommended restriction that it be permitted to acquire the operating rights and physical properties of White Line Motor Freight Company, Inc., and White Line Trucking Company, only if rail rates are applied in the performance of motor carrier service, is unwarranted and will so substantially impair the value of those physical properties and operating rights to the applicant and the*

9 *Trustees of The Chicago, Rock Island and Pacific Railway Company as to concern the propriety of the investment to which the applicant has tentatively been committed. Reluctantly, therefore, applicant will be obliged to conclude that, unless such a restriction be not imposed by the Commission as a condition precedent to acquisition, or unless a modification of such restriction as suggested by the applicant herein is acceptable, applicant must abandon this transaction."*

In the argument in these exceptions it was pointed out that the motor carrier operating rights of the vendors con-

stituted a material consideration to the purchase and that these would be destroyed or substantially impaired by a restriction to rail rates and rail billing such as recommended by the Examiner. Complainant urged that operations auxiliary or supplementary to train service of the controlling railroad should not be confined only to rail rates and rail billing. Division 5 of the Commission considered complainant's exceptions and on April 1, 1938, issued its report and order (copy of which is attached as Exhibit 3 hereto) approving the transaction, and specifically omitted from its report and order any restriction as to rail rates and rail billing. Complainant accepted the Commission's order of approval, the restriction as to rail rates and rail billing having been omitted therefrom, and the Commission's report and order stating among other things: "Applicant . . . is agreeable to abandonment of all rights except common carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids and the 'grandfather' applications of White Line will be considered as amended accordingly." Complainant was not permitted to institute operations until it had adopted the motor common carrier tariffs of its predecessor and pursuant to the instructions and requirements of the Commission as to manner of consummation, and the provisions of Sections 216 and 217 of Part II of the

10 Interstate Commerce Act, complainant did adopt the tariffs of its predecessor in the form prescribed by the Commission on April 5, 1938. Upon consummation complainant paid the required purchase price of \$59,400.00 for the operating rights and physical properties acquired, and in addition committed itself to large expenditures to establish suitable offices, terminals, facilities and equipment of a value exceeding \$445,000.00 in order to provide an attractive, dependable, efficient and adequate motor carrier service, all of which acts were taken and done in reliance upon orders of the Interstate Commerce Commission, and the certificate of convenience and necessity issued to complainant thereunder, which defined complainant's rights, as acquired from the White Line companies, to engage in such motor carrier business at rates and upon schedules theretofore published, filed and observed by the White Line companies, as adopted by the complainant and as thereafter from time to time amended, in conformity with the provisions of Section 216 of the Motor Carrier Act of August 9, 1935, as amended. Complainant has continu-

ously operated and is now operating pursuant to such motor tariffs and amendments thereto up to and including the present time.

## VI

At the time of the consummation of the aforesaid transaction on April 5, 1938, the Interstate Commerce Commission had not yet issued to the White Line companies or to complainant as successor in-interest, a certificate or certificates of public convenience and necessity as provided by Section 206(a) of the Motor Carrier Act of August 9, 1935 (40 Stat. L. 543), with respect to the route or routes involved in said transaction, although applications therefor had been duly filed and were pending in conformity with the provisions of said section. In said applications for cer-

11      tificates, and conformably with the provisions of Section 206 of the Motor Carrier Act, the White Line companies alleged and claimed that they were entitled to so-called "grandfather rights", having been in bona fide operation as common carriers by motor vehicle on June 1, 1935, and had so operated since that time. On June 14, 1938, the Interstate Commerce Commission issued what was commonly referred to as a compliance order, defining the operating rights of complainant as successor in interest to the White Line companies, copy of which order, with appendix thereto, is attached hereto as Exhibit 4. Thereafter, on August 5, 1938, the Commission issued its further compliance order, superseding said order of June 14, 1938, redefining the operating authority to which Rock Island Motor Transit Company was entitled, copy of which order, together with appendix thereto, is attached as Exhibit 5. Thereafter, on December 3, 1941, the Interstate Commerce Commission issued to complainant a certificate of public convenience and necessity, among other things, incorporating therein a description of the operating authority of complainant with respect to the motor routes acquired from the White Line companies, copy of which certificate of public convenience and necessity is attached as Exhibit 6 hereto.

## VII

In 1943 complainant concluded that it would be beneficial to extend its motor carrier operations in Western Iowa as complementary to the rights acquired from the White Line companies. Complainant had the right to serve every station on the main east-west line of its railroad affiliate, the

Chicago, Rock Island and Pacific Railroad Company, between Davenport, Iowa, and Omaha, Nebraska, except a few points between Atlantic, Iowa and Omaha. J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son (herein sometimes referred to as "Frederickson"), possessed Interstate motor common carrier rights permitting service between these points and in addition between points on the Harlan branch of said Chicago, Rock Island and Pacific Railroad, as shown on map Exhibit 1 hereof. Complainant thereupon conducted negotiations to acquire the Frederickson certificates and an agreement to effectuate said transaction was duly executed by the parties. In its application to the Interstate Commerce Commission for approval of the transaction at the conclusion of Exhibit D thereof, page 10, entitled "FACTS AND CIRCUMSTANCES WHICH APPLICANTS RELY UPON TO WARRANT APPROVAL OF THE PROPOSED TRANSACTION", complainant said:

12. "By findings and orders of the Interstate Commerce Commission, it has been established that the operations of the transferors are required by public convenience and necessity. The acquisition herein contemplated will continue this operation and will supply the service as a matter of public convenience and necessity, and in addition to the service formerly performed will offer coordinated, substituted, auxiliary and supplemental operations in conjunction with transferee's senior affiliate's rail service."

## VIII

8

On September 29, 1943, complainant filed its said application to acquire the operating authority of J. H. and D. H. Frederickson, the same being docketed as MC-F-2327 (and is herein sometimes referred to as the "Frederickson proceeding"). The application as amended was heard on November 17, 1943. Pursuant to the favorable report and order of Division 4 of the Interstate Commerce Commission dated November 28, 1944 (copy being attached as Exhibit 7), which contained no restriction as to rates, the transaction was consummated and service was instituted on January 22, 1945, the consideration of \$6,500.00 having been paid. As in the White Line proceeding (Docket 13 MC-F-445), following the approval of the acquisition of the Frederickson operating rights in Docket MC-F-2327, the Commission required complainant to adopt and it did adopt the common carrier motor vehicle tariffs

of its predecessor. Complainant has operated and is operating pursuant to such common carrier motor vehicle tariffs and amendments thereto. The transferred certificate has not yet been reissued in complainant's name.

## IX

On February 5, 1945, the Interstate Commerce Commission on its own motion reopened Docket MC-F-445, being the proceeding involving The Rock Island Motor Transit Company's acquisition of the White Line authorities, Docket MC-F-2327, The Rock Island Motor Transit Company's acquisition of J. H. and D. H. Frederickson authorities, and Docket MC-29130 (formerly MC-49147), The Rock Island Motor Transit Company's common carrier application, to consider what further restrictions, if any, should be imposed. The reopening and consideration was on the records as originally made eight years previously in the White Line proceedings, said Dockets MC-F-445 and MC-29130 (formerly MC-49147), and two years previously in the Frederickson matter.

Pursuant to said reopening the Commission issued its report and order (copy being attached as Exhibit 8 hereto) of March 4, 1946, thereby attempting and proposing to modify the authority under which complainant has been and was then operating since the institution of its operations under the respective authorities, such modifications consisting of (1) a restriction that transportation over the routes in question shall be conducted only at the rail rates and on the rail billing of complainant's affiliate, Chicago, Rock Island and Pacific Railroad, and (2) a condition that no shipments shall be transported between  
 14 any of the following points, or through or to or from more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois.

On May 23, 1946, complainant filed a petition for reconsideration by the entire Commission and on June 9, 1947, the Commission reopened the matter for hearing, saying it was doing so insofar as it was requested by complainant. On October 1, 1947, complainant filed a motion to rescind said reopening pointing out that no such request had been made and that the Commission's Action was, in fact, contrary to the assertions of complainant. On October 6, 1947, the Commission overruled said petition for rescinding the reopening. The Commission set the cause for rehearing

by order of September 10, 1947, assigning the matter for hearing on October 9, 1947, which was held accordingly. The report and order herein complained of (copy being attached as Exhibit 9) were issued April 11, 1949, effective May 31, 1949, and subsequently extended to June 30, 1949, confirming the previous order of February 5, 1945, Chairman Mahaffie and Commissioners Miller and Mitchell dissenting.

## X

Complainant has been and is conducting a common motor carrier business pursuant to its own rates and tariffs lawfully published and filed with the Interstate Commerce Commission. By its reports and orders of March 4, 1946, and April 11, 1949, the Commission holds that such publication, filing and use of rates by complainant are no longer permissible under complainant's certificates of public convenience and necessity and the various operating rights now held by complainant. The Commission now holds that to the extent complainant holds certificates limiting its motor vehicle service to that which is auxiliary to or supplemental of the rail service of complainant's railroad affiliate, Chicago, Rock Island and Pacific Railroad, it is without authority to perform service under all-motor local and all-motor joint rates with connecting motor carriers. Such holding and interpretation of the Commission are contrary to prior holdings and interpretations by the Commission with regard to the operating rights acquired from the White Line companies and Frederickson, and many years after acquisition reflect and unlawfully effect a change in policy by the Interstate Commerce Commission. Furthermore, such holdings and interpretations are contrary to holdings and interpretations of the Commission in complainant's acquisitions, hereinafter detailed, of the operating rights of other motor carriers.

The restriction to rail rates and the rate billing of Chicago, Rock Island and Pacific Railroad Company would prohibit complainant from transporting any traffic under its own billing as a motor common carrier and at rates lawfully published and filed by it conformably with the provisions of the Motor Carrier Act of 1935, and would eliminate complainant's participation in the aforementioned class of traffic which complainant alleges produced as to these routes gross revenue in excess of \$1,000,000.00 in 1948. Since the institution of its operations over these routes up to and including the present time the complain-

ant, as a common motor carrier operating under rights acquired as hereinbefore alleged, has been able to transport and has transported traffic over the entire route from Chicago, Illinois, to Omaha, Nebraska, inclusive, or to any point intermediate, which traffic might originate either at Chicago or Omaha to be transported the entire distance, or might be interlined between complainant and other motor carriers for such transportation. Likewise, complainant has engaged and now engages in the transportation of such traffic between numerous intermediate points located upon the routes so acquired.

In conducting business as aforesaid, in reliance upon the compliance orders of the Interstate Commerce Commission and the certificate of public convenience and necessity issued in pursuance thereof, copies of which are attached as Exhibits 4, 5 and 6 hereof, as well as the order of approval in the Frederickson proceeding (Exhibit 7), complainant not only paid substantial purchase prices for the rights and properties acquired from its predecessors in interest, but complainant also assumed and committed itself to assume large expenditures in providing adequate motor vehicle equipment, offices, terminals and facilities, which purchase prices and commitments, complainant avers, would not have been expended or assumed had complainant known at the time of approval of the transactions that restrictions such as are now intended by the report and order of the Commission of April 11, 1949, would later be imposed. Complainant avers that such restrictions are of a substantial nature and if enforced would materially reduce and impair the value of complainant's investment in the rights and properties acquired. The proposed action is contrary to the action of the Commission at the time of approval of the acquisitions involved and is contrary to uniform action taken by the Commission with regard to acquisitions by complainant of motor carrier certificates accomplished and authorized by the Commission since the White Line acquisition was consummated, such other acquisitions being:

MC-F-468 --Rock Island Motor Transit Company--  
Purchase -- Burlington Transportation  
Company--effective June 20, 1938.

MC-F-561 --Rock Island Motor Transit Company--  
Purchase--George H. Swaim--dated July  
12, 1939.

MC-F-701--Rock Island Motor Transit Company--  
Purchase--Harold L. Clark--dated April  
8, 1939.

MC-F-777 —Rock Island Motor Transit Company—  
Purchase—William F. Peterson—dated  
May 13, 1939.

MC-F-1305—The Rock Island Motor Transit Company  
—Purchase—Clinton, Davenport & Mus-  
catine Railway Company—dated Febru-  
ary 20, 1941.

MC-F-1327—The Rock Island Motor Transit Company  
—Purchase—E. R. Brillhart and George  
Frank (Mrs. Pearl Frank, Administra-  
trix)—February 20, 1941.

MC-F-1693—The Rock Island Motor Transit Company  
—Purchase—Fred E. Rees—dated March  
31, 1942.

MC-F-1928—The Rock Island Motor Transit Company  
—Purchase—Philip Frickle—dated Feb-  
ruary 4, 1943.

MC-F-1932—Chicago, Rock Island and Pacific Railway  
Co. (Joseph B. Fleming and Aaron Col-  
non, Trustees)—Control; The Rock Is-  
land Motor Transit Company—Purchase  
—A. B. Corpier and Boyd Amos Corpier  
—February 8, 1944.

MC-F-2069—Chicago, Rock Island and Pacific Railway  
Co. (Joseph B. Fleming and Aaron Col-  
non, Trustees)—Control; The Rock Is-  
land Motor Transit Company—Purchase  
—Hearn and Lucke—dated February 8,  
1944.

The imposition of the so-called key-points at Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois, would prevent and prohibit complainant from engag-  
18 ing in transportation as contemplated by the certifi-  
cates acquired. The effect of said key-point restric-  
tion would be that the complainant might not even transport shipments from Omaha, Nebraska, to Des Moines, Iowa, but only from Omaha to the first point west of Des Moines, and in the reverse direction from Des Moines only to the first point east of Omaha. Similarly, shipments might not be transported from Des Moines to the collective key-point of Davenport-Bettendorf-Rock Island-Moline, but only from Des Moines to the first point west of Davenport, Iowa, and in the reverse direction from Davenport to the first point east of Des Moines. What has been a single integrated operation would be divided into separate seg-

ments, should the order here complained of become effective, which proposed order complainant avers would substantially injure complainant and would be an unlawful exercise of power by the Interstate Commerce Commission.

The withdrawal from the handling of traffic at its own rates and own billing, and being confined by key-points as aforesaid, will necessitate the dismissal of approximately 96 employees involving an annual payroll exceeding \$334,000.00.

## XI

The certificate heretofore issued in Docket MC-F-445 and the rights acquired pursuant to the order in Docket MC-F-2327 comprised property and franchise rights, and the action of the Interstate Commerce Commission in ordering a substantial modification and diminution thereof would deprive complainant of property without due process of law contrary to the Fifth Amendment of the United States Constitution.

19

## XII

The order of April 11, 1949, as well as that of March 4, 1946, deprives complainant of substantially all of the value attributable to the certificate and the order theretofore confirmed in Dockets MC-F-445 and MC-F-2327, thereby depriving complainant of its property in the same without due process of law and in violation of the Fifth Amendment of the United States Constitution.

## XIII

Said order of April 11, 1949, as well as that of March 4, 1946, substantially modifies and eliminates rights acquired from predecessors, such action being beyond the jurisdiction and the powers of the Interstate Commerce Commission in that in proceedings pursuant to Section 213 of the Motor Carrier Act of 1935, or Section 5(2) of the Act of 1940, pursuant to which complainant acquired the operating rights here involved, the Commission is without authority after approval of the acquisition of one motor carrier by another to impose conditions altering or modifying the substantive provisions of certificates theretofore issued and lawfully acquired.

## XIV.

Said orders are arbitrary, discriminatory, not based upon any evidence, and beyond the jurisdiction and powers

of the Interstate Commerce Commission, and are therefore unlawful and should be declared unenforceable and of no effect. Said orders would revoke rights acquired and vested in complainant in said Dockets MC-F-445, MC-F-2327 and MC-29130. The proposed action under said orders would be contrary to the provisions of Section 212

20 of the Interstate Commerce Act, since such section contains the only authority of the Commission to modify or revoke such rights and the action now proposed is not authorized by said Section 212. Under Section 212 of the Interstate Commerce Act the Interstate Commerce Commission may only amend or revoke in whole or in part a certificate of convenience and necessity upon the application of the holder thereof, or may upon its own motion or upon a complaint, after notice and hearing, suspend, change or revoke such a certificate in whole or in part for willful failure to comply with any provision of Part II of the Interstate Commerce Act, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, provided, however, that no such certificate may be revoked (except upon application of the holder) unless the holder willfully fails to comply within a reasonable time, but not less than thirty days, with an order of the Commission commanding adherence to the rule or regulation of the Commission's condition of the certificate, or otherwise found to have been violated. None of the aforesaid conditions of Section 212 are here present and the Interstate Commerce Commission does not attempt by said orders here involved legally to justify its proposed action under said Section 212.

## XV

Said orders deprive complainant of the right, as well as the duty imposed upon it by Sections 216 and 217 of Part II of the Interstate Commerce Act, of filing, publishing and maintaining rates and schedules as a common carrier by motor vehicle; said orders deprive complainant of the right to enter into joint rates with other motor carriers permitted by said sections; and said orders would limit complainant only to enter into joint rates with its rail affiliate,

21 Chicago, Rock Island and Pacific Railroad—all in contravention of the express provisions of the Interstate Commerce Act.

## XVI

Complainant will be irreparably damaged by said order of April 11, 1949, in that through denying it the right to transport traffic at motor carrier rates as a common carrier by motor vehicle and restricting it to key-point service as proposed, complainant will lose revenues in excess of \$1,000,000.00 per year, such action of the Commission will destroy and impair complainant's substantial investments in property of a value exceeding \$445,000.00, contrary to law, and it will cause the discharge of a large number of employees contrary to the public interest.

## XVII

The orders of the Commission in imposing the restrictions of rail rates and rail billing, and the key-points of Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois, and denying it the right to transport freight as a common carrier by motor vehicle at motor vehicle rates under the Motor Carrier Act of 1935, is arbitrary, capricious, unreasonable, contrary to the records in said proceeding, a denial of due process of law, and beyond the jurisdiction, powers and authority of the Commission.

22

## PRAYER

WHEREFORE, Complainant, being without an adequate remedy at law, respectfully prays:

*First.* That upon the filing of this complaint, the Judge of this Court shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge;

*Second.* That process may issue against the defendants United States of America and the Interstate Commerce Commission.

*Third.* That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and a temporary stay or suspension of said order of the Interstate Commerce Commission of April 11, 1949, pending hearing and determination of complainant's application for interlocutory and permanent injunctions, be issued;

*Fourth.* That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney

General of the United States, as provided by law, a hearing shall be held, and an interlocutory injunction be issued, staying and suspending the said report and order of the Interstate Commerce Commission;

*Fifth.* That upon final hearing of this cause, a permanent injunction shall be issued, decreeing that reports and orders of the Interstate Commerce Commission herein complained of are null and void and are set aside, suspended and annulled, and that their enforcement, execution and operation shall forever be enjoined, and  
23 that the United States of America shall forever be restrained from taking any steps or instituting or further prosecuting any proceeding to enforce the said orders.

*Sixth.* That this Court grant to the complainant such other and further relief as by it may be deemed proper in the premises.

Respectfully submitted,

HARRY E. BOE,  
Harry E. Boe,  
MARTIN L. CASSELL,  
Martin L. Cassell,  
*Attorneys for Complainant.*

W. F. PETER,  
A. B. ENOCH,  
*Of Counsel.*

June 20, 1949.

24 *Duly sworn to by William F. Peterson.*  
*Jurat omitted in printing. (All in italics.)*

*Exhibit 1*

MAP SHOWING THE ROCK ISLAND MOTOR TRANSIT ROUTE,  
WHITE LINE AUTHORITY, FREDERICKSON AUTHORITY,  
AND ROCK ISLAND RAIL LINES.

See Following Exposure

31

*Exhibit 2*

REPORT AND ORDER RECOMMENDED BY EXAMINER HIGGINS,  
ISSUED FEBRUARY 12, 1938, IN WHITE LINE, MC-F-445.

33

## Interstate Commerce Commission

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

REPORT AND ORDER RECOMMENDED BY JOHN S. HIGGINS,  
EXAMINER, SECTION OF FINANCE, BUREAU OF MOTOR  
CARRIERS.

Served February 12, 1938

## NOTICE TO PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 20 days from date of service shown above, or within such further period as may be authorized for the filing of exceptions. Otherwise, at the expiration of said period for the filing of such exceptions, the attached order will become the order of the Commission and will become effective unless the order has been stayed or postponed by the Commission.

34

## Interstate Commerce Commission

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

Submitted ..... Decided .....

Purchase by The Rock Island Motor Transit Company of certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, approved and authorized. Conditions prescribed.

Harry E. Boe for applicant and rail carrier.

W. B. Hurlburt for vendors.

Floyd F. Shields, C. R. Olson, and George E. Wiard for protestants.

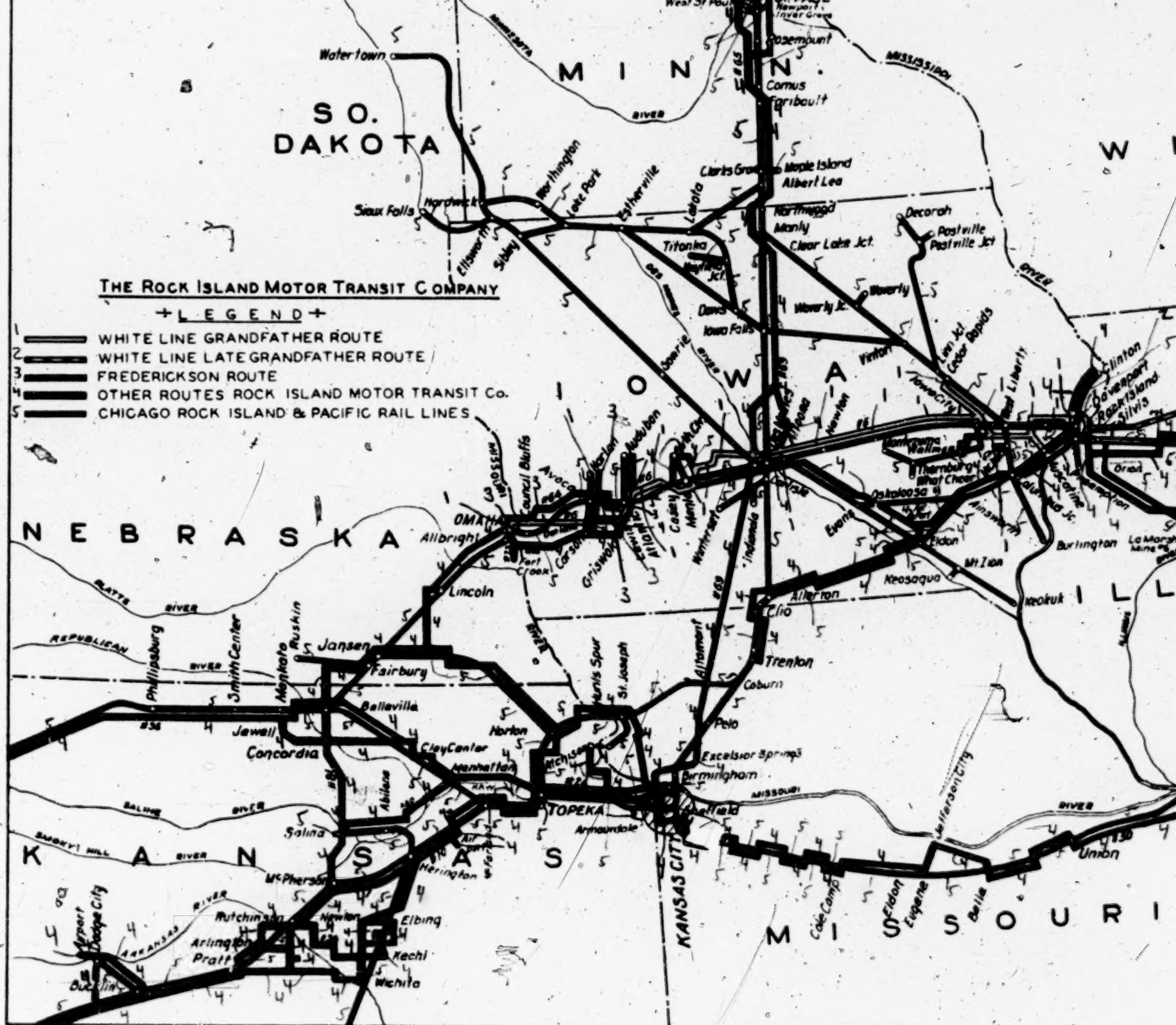
J. J. Brady, E. R. Brillhart, T. P. Scanlan, Fred C. Mayer, and James A. Gillen for intervenors and interested parties.

S O.  
DAKOTA

THE ROCK ISLAND MOTOR TRANSIT COMPANY

+ L E G E N D +

- 1 WHITE LINE GRANDFATHER ROUTE
- 2 WHITE LINE LATE GRANDFATHER ROUTE
- 3 FREDERICKSON ROUTE
- 4 OTHER ROUTES ROCK ISLAND MOTOR TRANSIT Co.
- 5 CHICAGO ROCK ISLAND & PACIFIC RAIL LINES





REPORT AND ORDER RECOMMENDED BY JOHN S. HIGGINS,  
EXAMINER, SECTION OF FINANCE, BUREAU OF MOTOR  
CARRIERS.

By application filed October 13, 1937, The Rock Island Motor Transit Company seeks authority under section 213, Motor Carrier Act, 1935, to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, hereinafter called Motor Freight and Trucking Company, respectively, for \$59,400, of which not to exceed \$9,400 represents indebtedness against certain equipment to be acquired, which applicant agrees to assume. As an incident to the above transaction, control of White Line Transfer & Storage Company, hereinafter called Storage Company, is to be acquired by Lawrence E. Stone under circumstances, hereinafter explained, which do not require approval by this Commission.

In accordance with the provisions of the act the application was referred to the examiner for hearing and recommendation of an appropriate order thereon. Hearing has been held, at which certain motor and rail carriers filed appearances, but offered no evidence. Briefs were filed.

Applicant,<sup>1</sup> an Illinois corporation, authorized to engage in transportation by motor vehicle but not now operating as a motor carrier, is a wholly owned subsidiary of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees), hereinafter called Rock Island.

Motor Freight and the Trucking Company, Iowa corporations, operate, so far as the rights involved in this proceeding are concerned, as carriers of property by motor vehicle over the same highway between Chicago, Ill., and Omaha, Nebr., approximately 500 miles, via East Moline, Moline, Rock Island, Ill., and Davenport, Des Moines, and Council Bluffs, Iowa, with minor routes to Muscatine and Cedar Rapids, paralleling generally the lines of the Rock Island between these points, except that between Chicago and East Moline, approximately 200 miles, the motor routes are 20 to 25 miles removed from the line of the Rock Island at the farthest point. Routes of Motor Freight east of Chicago are the subject of sale in a separate application,<sup>2</sup> and such irregular routes or contract rights

<sup>1</sup> Has application pending in No. MC-F-468, Rock Island Motor Transit Company—Purchase—Burlington Transportation Company.

<sup>2</sup> Involved in No. MC-F-304, W. E. Bell—Purchase—White Line Motor Freight Company, Incorporated.

which the Trucking Company may possess under its "grandfather" application and which applicant may acquire will be disposed of or abandoned by applicant. It is the latter's stated purpose to utilize only those common carrier rights which Motor Freight and Trucking Company may possess between Chicago and Omaha which serve points on the line of the Rock Island and whatever duplication in such rights may occur is to be extinguished. The Storage Company, an Iowa corporation, engages principally in local storage and transfer business in Des Moines and also hauls household goods and heavy loading machinery in over-the-road service. All three companies have pending "grandfather" applications.

Motor Freight, the Trucking Company, and the Storage Company are controlled through stock ownership except directors' qualifying shares, by Mrs. May E. Mills, widow of their founder, Pleasant J. Mills. Mrs. Mills, lacking business experience, and to relieve herself of responsibility, desired to dispose of the above companies as a unit and accordingly gave to Lawrence E. Stone, an executive official thereof, an option of her stock, which expires April 1, 1938. Trustees of the Rock Island were subsequently authorized by court order entered October 4, 1937, to execute, or cause applicant herein to execute, agreements for the purchase from Stone of the properties of Motor Freight and the Trucking Company.

By agreement with applicant dated October 4, 1937, Stone, as a condition to taking effect of such agreement, was to procure the deposit of all the outstanding shares of stock of the 3 companies with an escrow agent, and by contemporaneous escrow agreement by and between

37 Mrs. May E. Mills, applicant, Stone, and such agent, Valley Savings Bank, Des Moines, there was deposited with the latter 400 shares of stock of Motor Freight, 205 shares of stock of Trucking Company, and 575 shares of stock of Storage Company, constituting, respectively, all their outstanding capital stock, and applicant deposited with such agent the sum of \$80,000, which had been advanced to it by the Rock Island. The escrow agreement provides, in part, that if on or before April 1, 1938, certain events specified therein occur, unless the parties agree in writing to the disposition of the properties without awaiting such events, with notice to the agent, the latter will pay Mrs. Mills the above sum, and will deliver to Stone the stock of Motor Freight and the Trucking Company, and deliver to

applicant the stock of the Storage Company as security for an advance to Stone, hereinafter explained. Upon delivery of the stock of Motor Freight and the Trucking Company to Stone, the latter agrees to call a meeting of the respective stockholders and proceed to dissolve said corporations. In connection with this dissolution, Stone shall cause Motor Freight and the Trucking Company to transfer to him all their assets, in consideration of his assumption of their liabilities, excluding \$9,400 indebtedness against certain equipment which applicant agrees to assume. The sum of \$30,000 of the total purchase money was considered as an advance by applicant to Stone to permit the latter to effect the transaction, and acquire control of the Storage Company, and when the stock of the latter is delivered by the escrow agent to applicant as collateral for such advance, Stone concurrently agrees to repay applicant the sum advanced evidenced by 4 promissory notes, bearing interest at the rate of 5 percent per annum, payable semi-annually. Applicant has the right, in default of principal or interest, to vote such stock, but upon payment of said notes, the

stock will be released to the record owner. Numerous  
 38 other provisions relating to conditions under which the contract is to become effective, damage, insurance, State taxes, maintenance of equipment, and restrictions on the Storage Company's operations in competition with applicant, are specifically recited therein and need not be here repeated. Stone does not control a motor carrier and undertook to accomplish the foregoing transaction in the manner indicated in order that the three properties might be disposed of as a unit. Pursuant to the foregoing, applicant will expend \$50,000 for the rights and property of Motor Freight and the Trucking Company, excluding indebtedness assumed. Any difference between the amount of \$9,400 assumed by applicant and the actual indebtedness as of date of conveyance of the equipment shall be credited one-fourth on each of four notes given by Stone, who will be further credited upon his debt to applicant with any license fees for the year 1938 which he pays or causes to be paid by Motor Freight and the Trucking Company. For such expenditure, if the application is approved, applicant will receive State certificates and permits, specifically designated in the agreement; whatever interstate rights Motor Freight and the Trucking Company may obtain pursuant to their respective "grandfather" applications; good will and the exclusive right to use the name "White Line" when not in

combination with "Transfer and Storage". In addition, it will receive certain physical property, except garage tools and equipment located at Des Moines, consisting principally of approximately 130 motor vehicles with an estimated replacement cost of \$50,000, and a depreciated ledger value of approximately \$44,786 as of October 31, 1937.

The Rock Island's balance sheet as of August 31, 1937, shows assets of \$503,209,452, including current assets \$23,981,846. Liabilities include current liabilities \$248,519,913. Income statements for 1935, 1936, and first 8 months of 1937, show deficits of \$15,023,571, \$13,380,980, and \$6,831,161, respectively.

39 Balance sheet of Motor Freight as of October 31, 1937, shows total assets of \$90,034, consisting of: Current assets \$29,322, including due from connecting carriers \$9,927, accounts receivable, less reserve for bad debts, \$8,103, c. o. d.'s receivable \$6,242, and material and supplies \$2,775; carrier-operating property, less depreciation, \$54,705; advances to employees \$544; and prepayments \$5,462. Liabilities were: Current liabilities \$112,802, including due Storage Company \$68,972, accounts payable—trade \$10,195, due connecting lines \$10,171, and accrued taxes and insurance \$7,526; reserve for claims \$515; Midway Transit Co. \$500; capital stock \$40,000; and surplus (debit balance) \$63,783. Income statement for 1935 shows net income, after provision for Federal income taxes, of \$3,727, and statements for 6 months ended June 30, 1936, 12 months ended June 30, 1937, and 4 months ended October 31, 1937, show deficits of \$25,527, \$26,069 and \$3,304, respectively.

Trucking Company's balance sheet as of October 31, 1937, shows total assets of \$14,526, consisting of: Current assets \$11,554, principal accounts receivable; carrier-operating property, less depreciation, \$2,792; and deferred debits \$180. Liabilities were: Current liabilities \$307; capital stock \$20,000, and surplus (debit balance) \$5,781. Income statement for 1935 shows net income, after provision for Federal income taxes, of \$801, and statements for the 6 months ended June 30, 1936, 12 months ended June 30, 1937, and 4 months ended October 31, 1937, show deficits of \$331 and \$5,485, and net income of \$73, respectively.

Applicant's balance sheet as of November 15, 1937, giving effect to proposed transaction, shows total assets of \$103,950, consisting of: Cash working fund proposed to be advanced by the Rock Island \$10,000; notes receivable—L. E. Stone \$30,000; investments and advances—Rock Island \$3,445; cost of acquiring Motor Freight and the Trucking

40 Company \$59,400; and incorporation fees and other expenses \$1,105. Liabilities were: Non-negotiable debt to Rock Island \$90,000; equipment purchase contracts payable \$9,400; capital stock \$10,000; and surplus (debit balance) \$5,450.

As a result of loss of less-than-carload traffic by the Rock Island, and in order to improve the former's present service, applicant intends to use the operating rights acquired in serving points located on the line of the Rock Island between Chicago and Omaha for 3 methods of operation, (1) a coordinated rail-truck service, at rail rates, auxiliary to existing all-rail service by moving merchandise cars to certain set-out points, and completing delivery to destination by truck; (2) an all-truck service under rail rates and billing on short hauls between stations where feasible and economical as a substitute for rail service; and (3) an all-truck service restricted to points on the line of railroad at rates comparable with those of motor competitors.

Considerable testimony was introduced by applicant's traffic and operating witnesses showing the manner in which a correlated rail-truck service would expedite and improve present all-rail service to intermediate points between the above cities. By way of illustration, a traffic official of the Rock Island testified that all-rail service from Chicago to such points as Durant, West Liberty, Tiffin, and Marengo, Iowa, requiring approximately 38 to 41 hours, could be expedited as much as 24 hours if Chicago tonnage were moved by rail to a set-out point, Silvis, Ill., for example, and trucked beyond to these points and a similar arrangement is proposed on east-bound tonnage out of Omaha. In instances where all-truck service is shown to be superior to an all-rail service, especially on short hauls, station to station, for example, between Davenport and Wilton Junction, Iowa, applicant proposes to render truck service at rail rates and under rail billing without relationship to any

41 rail movement, and further proposes, as an example of the third method, an all-truck service between Chicago and Omaha, at competitive truck rates. Personnel and facilities of the Rock Island are to be made available to the proposed operation and present handling of c. o. d. shipments and loss and damage claims improved, and while no detailed estimates were furnished showing the monetary savings expected, opinion was expressed that operating economies would result, principally from decreased use of rail merchandise cars. Various advantages resulting from the proposed service were recited by repre-

sentatives of various business organizations and shippers located along the route. The expenditure proposed bears a reasonable relationship to the properties acquired and expected benefits therefrom and the presence of other rail and motor carriers in the territory precludes any possibility of undue restraint of competition.

Protestants urge denial of the application because applicant has not described with sufficient exactitude the precise plan or manner in which it proposes to correlate rail-truck service or resulting economies; the financial condition of the companies here involved and the competitive situation in the territory does not justify the purchase in the public interest; and rail-truck coordination may be accomplished by the railroad through use of independent motor lines. The proposed rail-truck coordination was sufficiently described both generally and by typical examples, to justify approval thereof, subject to the conditions and restrictions hereinafter imposed and there is no prohibition in the Motor Carrier Act, 1935, against a railroad undergoing reorganization acquiring motor lines, provided it meets the required statutory proof. Denial of the application because of the competitive conditions existing would leave the parties subject to such conditions and deprive the public of improved rail-truck service, to the detriment of all. Undoubtedly, coordination may be accomplished by a rail carrier through use of independent truck lines but it can not be compelled to use such arrangement contrary to its will and, so far as this particular proceeding is concerned, the evidence is that better results can be obtained if the motor lines here involved are directly controlled by the railroad. These contentions must be rejected.

Protestants further urge, in event the application is approved, that applicant should, following *Pennsylvania Truck Lines, Inc., Acquisition of Control*, 1 M. C. C. 101, 5 M. C. C. 9 and 49, be precluded from engaging in truck service which has no direct relationship to rail movement whether such service is rendered under rail or competitive motor rates. Motor operations by a rail subsidiary which otherwise compete with the railroad itself were among those disapproved in the above decision, but upon the premise that the proposed all-truck service at rail rates and rail billing for station-to-station short hauls will be non-competitive as to such rates and a substituted superior service by use of a different instrumentality (truck or rail-car),

provisional authority for such service should be granted, subject to restrictions or modifications which may result from determination of similar proposals pending before this Commission on re-opened hearing in *Pennsylvania Truck Lines, Inc.—Control—Alko Exp.*, 5 M. C. C. 77, or such further modifications or restrictions as may become necessary. Nothing herein contained, however, is to be taken as authorizing applicant to engage in all truck service at competitive motor rates.

The general plan for correlated rail-truck service is somewhat similar in character to that described in *Pennsylvania Truck Lines, Inc., Acquisition of Control, supra*, and leads to the same conclusions in respect thereto. The Commission there approved the acquisition of a motor-truck line by a railroad subsidiary but conditioned its approval and authorization to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad in order to protect the traffic rights of competing common carriers at points not previously served by the railroad. A similar condition will be imposed herein, and the findings will further provide that applicant shall not engage in motor service at competitive motor rates; that it shall not conduct any contract or irregular route operations in event such rights may be acquired herein and that it shall not vote the stock of White Line Transfer & Storage Company now pledged with it, in event of default, as provided in the agreement, unless it receives specific authority from this Commission.

The examiner finds that purchase by The Rock Island Motor Transit Company of properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, including the right to operate pending determination of the respective "grandfather" applications of these companies and the right, so far as operating rights the transfer of which is herein authorized are concerned, to any certificates which may be issued as a result of said applications, upon the terms and conditions set forth in the title application, except as hereinafter modified, which terms and conditions are found to be just and reasonable, will promote the public interest by enabling The Chicago, Rock Island and Pacific Railway Company to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition, and that the conditions of section 213 of the act have been or will be fulfilled; *Provided, however*, that the authority herein granted (1) is subject to the limitations that appli-

cant shall not render service from or to, or interchange traffic at, any point other than a station on the lines of The Chicago, Rock Island and Pacific Railway Company,

and shall be subject to such further limitation as it  
44 may hereafter be further necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition; (2) that no truck service shall be conducted at other than rail rates; (3) that no contract or irregular route operations shall be conducted pursuant to the rights acquired, and (4) that neither applicant nor the railroad, their directors, officers, or agents, shall directly or indirectly vote the stock of White Line Transfer & Storage Company, without specific authority from this Commission.

An appropriate order, in the form attached, should be entered.

Recommended by John S. Higgins,  
Examiner, Section of Finance,  
Bureau of Motor Carriers.  
JOHN S. HIGGINS (Signature)

45 ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the ..... day of ....., A. D. 1938.

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, *et al.*

*It appearing,* That the above-entitled matter was duly referred, pursuant to the provisions of section 205, Motor Carrier Act, 1935, for hearing and recommendation of an appropriate order; that upon due notice a public hearing was held; that a recommended order with accompanying report containing the findings of fact and conclusions thereon was duly filed and served which report is made a part hereof:

*It is ordered,* That purchase by The Rock Island Motor Transit Company of operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, upon the terms and conditions set forth in the findings in said report, be, and it is hereby, approved and authorized.

*It is further ordered,* That if the parties to the transaction herein authorized desire to consummate same, they shall notify this Commission of their intention so to do, in writing, prior to the consummation thereof, and promptly take such further steps as will insure compliance with sections 215, 217, and 221 of the act, and with the rules, regulations and requirements promulgated thereunder.

*It is further ordered,* That recital in the accompanying report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

*It is further ordered,* That before recording the purchase upon its books, applicant shall submit, in triplicate, the related journal entries to our Bureau of Motor Carriers for approval.

*And it is further ordered,* That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the Motor Carrier Act, 1935, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL,  
*Secretary.*

(SEAL)

47

*Exhibit 3*

REPORT AND ORDER OF DIVISION 5 AUTHORIZING PURCHASE IN  
WHITE LINE MC-F-445, Dated APRIL 1, 1938.

49

INTERSTATE COMMERCE COMMISSION

No. MC-F-445.

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, *et al.*

Submitted March 14, 1938.

Decided April 1, 1938.

Purchase by The Rock Island Motor Transit Company of certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, approved and authorized, subject to conditions.

Harry E. Boe and A. B. Howland for applicant and controlling rail carrier.

W. B. Hulbert for vendor and controlled motor carriers.

C. R. Olson and Floyd R. Shields, for motor-carrier protestants.

E. R. Brillhart, George M. Cummins, C. C. Crouse, James A. Gillen, T. P. Scanlan, H. F. Sundberg, and George E. Wiard for rail and motor-carrier interveners.

## REPORT OF THE COMMISSION

### DIVISION 5, COMMISSIONERS EASTMAN, LEE AND ROGERS.

#### By DIVISION 5:

Exceptions were filed by applicant, vendor, and certain interveners to the order recommended by the examiner. Our conclusions differ somewhat from those recommended.

50 The Rock Island Motor Transit Company, by application filed October 13, 1937, seeks authority under section 213, Motor Carrier Act, 1935, to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company<sup>1</sup> for \$59,400 of which not to exceed \$9,400 represents indebtedness outstanding against certain equipment to be acquired in the transaction which applicant will assume. As an incident to the above transaction, control of White Line Transfer & Storage Company<sup>2</sup> is to be acquired by Lawrence E. Stone<sup>3</sup> under circumstances, hereinafter explained, which do not require our approval under section 213. Two motor carriers intervened in opposition to the application and various other such carriers and one rail carrier either intervened or were represented at the hearing for the purpose of protecting their interests. None of these parties offered any evidence.

Applicant, an Illinois corporation, organized April 20, 1927, is controlled through ownership of its stock by Rock Island Improvement Company, a holding company, whose stock, in turn, is owned by The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees).<sup>4</sup> Prior to October 19, 1932, it conducted intrastate motor-truck operations within Illinois but has not since engaged in any business, its operations having been suspended on that date by

<sup>1</sup> Herein called, respectively, White Freight, and White Trucking, and, collectively, White Lines.

<sup>2</sup> Herein called Storage.

<sup>3</sup> Herein called vendor.

<sup>4</sup> Herein called the railroad.

Illinois authorities. It has pending an application<sup>5</sup> under section 213 for authority to purchase operating rights between Des Moines, Iowa, and Minneapolis and St. Paul, Minn. Motor-vehicle operations are conducted by the  
 51 railroad between St. Joseph and Kansas City, Mo., under contract with an independent trucking company, and are covered by a pending "grandfather" application. Several BMC-8 applications for authority to extend operations and one section—213 application<sup>6</sup> for authority to lease certain operating rights filed by the railroad are also pending.

White Lines, Iowa corporations, operate pursuant to pending "grandfather" applications as motor carriers of property in interstate or foreign commerce, White Freight operating as a common carrier over regular routes in Michigan, Indiana, Illinois, Iowa, and Nebraska,<sup>7</sup> and White Trucking operating as a common or contract carrier in the same and several other States. All of the capital stock of these companies and Storage, a motor carrier operating a local storage and transfer business in Des Moines and over-the-highway service hauling special commodities in several eastern and western States, is owned by May E. Mills, the aged widow of their founder, Pleasant J. Mills. Mrs. Mills lacking business experience, and having neither the physical capacity nor desire to continue the aforesaid operations, has sought for some time to dispose of her holdings in the three companies as a unit, being unwilling to trade on any other basis. For this purpose she gave vendor, an official of each company and general manager of the entire enterprise, an option to purchase her stock, which option expires on April 1, 1938. The only purchase proposal received by vendor which conformed to the expressed instructions of the Mrs. Mills was that of applicant herein the latter being interested in obtaining common-carrier  
 52 operating rights between Omaha, Nebr., and Chicago, Ill., including two side routes as hereinafter mentioned, alleged to be possessed by White Lines.

<sup>5</sup> No. MC-F-468, Rock Island Motor Transit Company—Purchase—Burlington Transportation Company.

<sup>6</sup> No. MC-F-183, Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees)—Lease—Wm. F. Peterson.

<sup>7</sup> Operating rights between Chicago, Ill., and points in Indiana and Michigan and certain physical property are the subject of sale in No. MC-F-304, W. E. Bell—Purchase—White Line Motor Freight Company, Incorporated.

Applicant is not interested in the operating rights of Storage, but to secure the rights of White Lines it was necessary to formulate some plan to effect concurrent dispositions of the operations of Storage.

The proposal, which is the subject matter of the instant application, is contained in two agreements dated October 4, 1937, one between applicant and vendor, and the other an escrow agreement, entered into jointly by applicant, vendor, Mrs. Mills, and Valley Savings Bank, Des Moines, the latter the escrow agent. Under the proposal applicant would acquire all of the operating rights and physical property of White Lines, not involved in No. MC-F-304, and vendor would acquire stock control of Storage. To effectuate the transfer and acquisition of control vendor is to exercise his option and deposit with the escrow agent all of the outstanding stock of the three companies, and applicant is to deposit with such agent the sum of \$80,000, the total purchase price of the stock. The deposits have been made with that agent, who is authorized, upon receipt of certified copies of orders from the governing Federal and State authorities approving the transfer of the rights and property of White Lines, to pay the \$80,000 to Mrs. Mills, and to deliver to vendor all the outstanding stock of White Lines, and to applicant, the outstanding stock of Storage as security for an advance to vendor, hereinafter explained. Upon delivery of the stock of White Lines to vendor, the latter is to effect dissolution of these companies and, in connection with such dissolution, is to acquire their rights and physical assets in consideration of his assuming their liabilities, except an equipment obligation of \$9,400 which applicant is to assume, and thereafter convey to applicant the rights and property of White Lines. Of the total \$80,000 stock-purchase price \$30,000 was considered as an advance by applicant to vendor to enable him to consummate his part of the transaction. Vendor is to repay applicant the sum advanced in four promissory notes, bearing interest at 5 percent, payable semi-annually from the date the stock of Storage is released to applicant. Under the terms of the agreement, applicant has the right, in default of principal or interest, to vote such stock, but upon payment of the notes it is to release the stock to the record owner. This latter aspect of the transaction is the subject of later consideration herein.

Applicant will expend for its part of the transaction a total of \$59,400 for which it will receive certain State cer-

tificates and permits; whatever interstate operating rights White Lines may obtain pursuant to their respective "grandfather" applications; goodwill; the exclusive right to use the name "White Lines" when not in combination with the words "Transfer and Storage"; and physical property, consisting principally of motor vehicles, having a net book value as of October 31, 1937, of \$44,786.

If the instant application is approved, applicant would use only such common-carrier operating rights as White Lines may have over the route between Omaha and Chicago, 500 miles, and over two short branch routes to Muscatine and Cedar Rapids, and agrees to abandon claims to all other operating rights of White Lines, so far as the instant transaction is concerned, including any duplication in rights over the routes to be retained. Between East Moline, Ill., and Omaha, 300 miles, the highway closely parallels the railroad. Between the former point and Chicago the maximum point of divergence between the highway and railroad is approximately 25 miles. Service is not to be provided to any point not also a station on the railroad.

The balance sheet of the railroad, which has advanced the funds necessary to complete the respective transactions, shows assets of \$503,209,452, including current assets \$23,981,846. Liabilities include current liabilities \$248,519,913. Income statements for 1935, 1936, and the 8-months' period ended August 31, 1937, show deficits of \$15,023,571, \$13,380,980, and \$6,831,161 respectively.

The balance sheet of White Freight as of October 31, 1937, shows total assets of \$90,034, consisting of: Current assets \$29,323, including due from connecting carriers \$9,927, accounts receivable, less reserve for bad debts, \$8,103, c. o. d.'s receivable \$6,242, and material and supplies \$2,775; carrier-operating property, less depreciation, \$54,705; advances to employees \$544; and prepayments \$5,462. Liabilities were: Current liabilities \$112,802 including due Storage Company \$68,972, accounts payable—trade \$10,195, due connecting lines \$10,171, and accrued taxes and insurance \$7,526; reserve for claims \$515; due Midway Transit Co. \$500; capital stock \$10,000; and surplus (debit balance) \$63,783. Income statement for 1935 shows net income, after provision for Federal income tax, of \$3,727, and statements for the 6-months' period ended June 30, 1936, 12-months' period ended June 30, 1937, and

4-months' period ended October 31, 1937, show deficits of \$25,527, \$26,069, and \$3,304, respectively.

The balance sheet of White Trucking as of October 31, 1937, shows total assets of \$14,526, consisting of: Current assets \$11,554, principally accounts receivable; carrier-operating property, less depreciation, \$2,792; and deferred debits \$180. Liabilities were: Current liabilities \$307; capital stock \$20,000; and surplus (debit balance) \$5,781. Income statement for 1935 shows net income, after provision for Federal income tax, of \$801, and statements for the 6-months' period ended June 30, 1936, 12-months' period ended June 30, 1937, and 4-months' period ended October 31, 1937, shows deficits of \$331 and \$5,485, and net income of \$73, respectively.

55 : Applicant's balance sheet as of November 15, 1937, giving effect to the proposed transaction, shows total assets of \$103,950, consisting of: Cash working fund proposed to be advanced by the railroad \$10,000; notes receivable—L. E. Stone \$30,000; investments and advances—the railroad \$3,445; cost of acquiring White Lines \$59,400; and incorporation fees and other expenses \$1,105. Liabilities were: Non-negotiable debt to the railroad \$90,000; equipment purchase contracts payable \$9,400; capital stock \$10,000; and surplus (debit balance) \$5,450.

In an effort to retrieve some of the substantial volume of less-than-carload freight diverted from the railroad to competing highway carriers, and to improve the railroad's service to the public, applicant proposes to utilize the operating rights of White Lines between Omaha and Chicago in the conduct of three distinct types of service, (1) a co-ordinated rail-truck service, to be auxiliary to existing all-rail service by moving merchandise cars to certain concentration or set-out points, and then making distribution by truck; (2) an all-truck service on short hauls between stations, where feasible and economical, as a substitute for rail service, and (3) an all-truck service restricted to points on the railroad, but in addition to rather than a substitute for rail service.

Considerable testimony was offered showing in detail the manner in which it is proposed to effect correlation of truck-and-rail service over the routes described, and many resulting advantages were recited. The general plan is similar in character to that outlined in *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101.

and 5 M. C. C. 9 and 49, hereinafter called the *Barker case*, and leads to the same conclusions reached in that case, namely:

56 The motor vehicle can undoubtedly be used as a very valuable auxiliary or adjunct to railroad service, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such co-ordination of rail and motor-vehicle operations should be encouraged. The result will be a new form of service which should prove of much public advantage. Nor do we believe that the creation of this new form of service will "unduly restrain competition." On the contrary, it should have the opposite effect.

We condition our authorization in the *Barker case* to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad, and in general indicated the scope of approved and disapproved operations. Many of the operating rights which would accrue to applicant under the instant transaction, if no conditions were imposed, are of a character which we disapproved in the case cited. Applicant concedes this fact and, as heretofore stated, is agreeable to abandonment of all rights except common-carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids, and the "grandfather" applications of White Lines will be considered as amended accordingly.

Protestants urge that we deny the application on the grounds (1) that applicant has not described with sufficient particularity the precise plan or manner in which it proposes to coordinate rail-truck service or resulting economies; (2) that the financial conditions of the railroad and White Lines do not justify the purchase in the public interest; (3) that the resulting competitive situation would be contrary to the intent of the act; and (4) that rail-truck service may be accomplished through use of independent motor lines. The proposed plan of operations was sufficiently described, both generally and by typical examples, to justify our approving the transaction, subject to the conditions and restrictions hereinafter imposed. While 57 it is true that the railroad is in financial straits, the evidence warrants the conclusion that the proposed transaction will not harm it but rather work to its financial advantage. The third argument is also untenable because,

as numerous motor-carrier competitors operate throughout the territory, there will be no restraint of competition. It may be, as contended, rail-and-highway coordination may be accomplished through use of independent truck lines. However, there is nothing in the law to prevent a railroad, if it otherwise meets the proof requirements of the law, from acquiring control of a motor carrier to be used for this purpose, and we are satisfied that the proof requirements have been met in the instant proceeding.

In one exceptions brief it is stated:

Exception is taken to the proviso that applicant shall not render service from or to, or interchange traffic at any point other than a station on the lines of the Chicago, Rock Island and Pacific Railway Company. This exceptor believes that such restrictions will be against public interests as represented by Cedar Rapids shippers because it is impossible to foresee the changes that may take place in the transportation field in Iowa.

Respecting the foregoing, what we stated in the *Barker case* is equally applicable herein, namely:

Nor do our conclusions overlook the interests of the shipping public along the routes here considered. If as a result of proceedings initiated by shippers it is shown, after full hearing, that existing transportation facilities are inadequate or otherwise unsatisfactory at a point in connection with which service is prohibited under the terms of the order herein, such evidence may be a basis for our removing the restriction in the pertinent certificate and ordering present applicants to render service to that point. (5 M. C. C. 9, 14.)

Another intervener excepted to the examiner's recommended findings because:

58 The report contains no provision to the effect that if the Chicago, Rock Island and Pacific Railway extends to its owned and controlled motor carrier, the applicant herein, the privilege of through routes and joint rates, then both the railroad and its motor carrier should be required to extend a similar privilege to such other motor carriers as may request same.

The act contains specific provisions governing our powers with reference to the regulation of motor carrier rates, including joint rates with other types of carriers. We are of the opinion, therefore, that there is no occasion to attach conditions affecting rates to a grant of authority herein under section 213.

Our approval in the *Barker case* was upon the condition, among others, that the Pennsylvania Railroad Company

take such steps as would be legally possible to acquire, subject to our approval, from an intermediate holding company, the American Contract and Trust Company, all interest which the latter owned in the applicant motor carrier, Pennsylvania Truck Lines, Incorporated. Our approval herein will similarly be conditioned upon elimination of the intermediate holding company.

As vendor is neither a motor carrier nor a person controlling such carrier, his proposed acquisition of the stock of Storage does not require our approval under section 213. However, as heretofore pointed out, this stock is to be pledged with applicant to secure its advance of \$30,000 to vender in order that he might acquire the control of that carrier and thus consummate his part of the transaction. If vendor defaults in the repayment of this sum applicant would, so far as the agreement is concerned, apparently come into control of another motor carrier. Its routes, because of their location in relation to the railroad, could not, so far as evidence herein is concerned, be used to public advantage in the latter's operation. Obviously the agreement, so far as it might result in acquisition of control of Storage by the railroad, cannot lawfully be consummated without our authority, and nothing herein is to be construed as granting such authority either directly or by implication.

We find that purchase by The Rock Island Motor Transit Company of the previously described operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, including the right to operate pending determination of the respective "grandfather" applications of these companies and the right, so far as operating rights the transfer of which is herein authorized is concerned, to any certificates which may be issued as a result of said applications upon the terms and conditions set forth in the title application, except as hereinafter modified, which terms and conditions are found to be just and reasonable, will promote the public interest by enabling The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees) to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled: *Provided, however*, (1) that the said railroad shall promptly take such steps as are legally possible and necessary to acquire, subject to our approval, from Rock Island Improvement Com

pany all interest which the latter owns in The Rock Island Motor Transit Company; (2) that applicant shall not, if the authority herein granted is exercised, render service from or to, or interchange traffic at any point other than a station on the lines of said railroad; (3) that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition; and (4) that applicant shall not, without our authority, vote any of the stock of White Line Transfer & Storage Company, or exercise any control over its affairs in any manner whatsoever.

An appropriate order will be entered.

COMMISSIONER ROGERS dissents.

61

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 1st day of April, A. D. 1938.

No. MC-F-445.

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

Hearing and investigation of the matters and things involved in this proceeding having been had, and said division, on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof;

*It is ordered*, That purchase by The Rock Island Motor Transit Company of the described operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, upon the terms and conditions set forth in the findings in said report, be, and it is hereby, approved and authorized.

*It is further ordered*, That if the parties to the transaction herein authorized desire to consummate same, they shall notify this Commission of their intention so to do, in writing, prior to the consummation thereof, and promptly take such further steps as will insure compliance with sections 215, 217, and 221 of the act, and with rules, regulations and requirements promulgated thereunder.

*It is further ordered*, That recital in the said report of balance-sheet and other financial data shall not be construed

62 as approving accounting methods or expenditures represented thereby.

*It is further ordered,* That before recording the purchase upon its books, applicant shall submit, in triplicate, the release journal entries to our Bureau of Motor Carriers for approval.

*And it is further ordered,* That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the act, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL,  
*Secretary.*

(SEAL)

63 *Exhibit 4.*

COMPLIANCE ORDER AND APPENDIX ISSUED BY I. C. C. JUNE 14, 1938, IN MC-29130, WHICH INCLUDES AUTHORITY APPLIED FOR IN MC-49147.

65 ORDER

At a session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of June, A. D. 1938.

No. MC 29130\*

APPLICATION OF ROCK ISLAND MOTOR TRANSIT CO.,  
A CORPORATION, CHICAGO, ILLINOIS.

After due investigation:

*It appearing,* That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification set forth as appended on the reverse side hereof or attached hereto, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

*It is ordered,* That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, governing the filing of common carrier rate publications and filing and approval of evidence of security for the

protection of the public, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification set forth as appended on the reverse side hereof or attached hereto, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and that on and after 30 days from date of this order, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein within 30 days from date of this order, then said applicant shall show cause, if any there be, within 60 days from the date of this order, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission within 30 days from the date of this order, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, Division 5.

W. P. BARTEL,  
Secretary.

(SEAL)

67 APPENDIX TO THE ORDER OF INTERSTATE COMMERCE  
COMMISSION, DIVISION 5,

Dated the 14th day of June, 1938.

No. MC 29130\*

APPLICATION OF ROCK ISLAND MOTOR TRANSIT CO.,  
A CORPORATION, CHICAGO, ILLINOIS.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign

commerce as a common carrier by motor vehicle of the commodities indicated over regular routes, between fixed termini, and to and from intermediate and off-route points, is as specified below:

*Commodities generally*, except those of unusual value, and except high explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between Des Moines, Iowa, and Omaha, Nebraska:

From Des Moines over U. S. Highway 6 to Omaha, and return over the same route.

All intermediate points.

Between Des Moines, Iowa, and Davenport, Iowa:

From Des Moines over U. S. Highway 6 to Davenport, and return over the same route.

All intermediate points.

Off-route points: Cedar Rapids, Muscatine and Oxford, Iowa.

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\* This includes authority applied for in Docket No. MC 49147.

/69

*Exhibit 5.*

COMPLIANCE ORDER AND APPENDIX ISSUED BY I. C. C., AUGUST 5, 1938, IN MC-29130, WHICH INCLUDES AUTHORITY APPLIED FOR IN MC-49147.

71 At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 5th day of August, 1938.

No. MC 29130\*

APPLICATION OF ROCK ISLAND MOTOR TRANSIT CO.,  
A CORPORATION, CHICAGO, ILLINOIS.

After due investigation:

*It appearing*, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

*It is ordered*, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission

thereunder, governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification set forth as appended on the reverse side hereof or attached hereto, and made a part of this order.

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*It is further ordered,* That in all other respects the said application shall be, and it is hereby, denied, and that on and after 30 days from date of this order, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

*It is further ordered,* That in the event said applicant has not complied with the requirements herein within 30 days from date of this order, then said applicant shall show cause, if any there be, within 60 days from the date of this order, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

*It is further ordered,* That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission within 30 days from the date of this order, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

*And it is further ordered,* That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

(SEAL)

- W. P. BARTEL,  
Secretary.

73 APPENDIX TO THE ORDER OF THE INTERSTATE COMMERCE  
COMMISSION, DIVISION 5,

Dated the 5th day of August, 1938.

No. MC 29130\*

APPLICATION OF ROCK ISLAND MOTOR TRANSIT CO.,  
A CORPORATION, CHICAGO, ILLINOIS.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over regular routes, between fixed termini, and to and from intermediate and off-route points, is as specified below:

*Commodities generally*, except those of unusual value, and except high explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Des Moines, Iowa, and Omaha, Nebr.:

From Des Moines over U. S. Highway 6 to Omaha, and return over the same route.

All intermediate points.

Between Des Moines, Iowa, and Silvis, Ill.:

From Des Moines over U. S. Highway 6 to Silvis, and return over the same route.

All intermediate points.

Off-route points: Cedar Rapids, Muscatine, Bettendorf, and Oxford, Iowa.

\* This includes authority applied for in Docket No. MC 49147.

75

*Exhibit 6*

WHITE LINE TRANSFERRED CERTIFICATE AS FIRST ISSUED TO THE  
ROCK ISLAND MOTOR TRANSIT COMPANY, DECEMBER 3, 1941.

77 CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

No. MC 29130\*

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
CHICAGO ILLINOIS.

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 5, held at its office in Washington, D. C., on the  
3rd day of December, A. D. 1941.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions

of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

78 IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

#### REGULAR ROUTES:

*General commodities*, except those of unusual value, and except livestock, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Des Moines, Iowa, and Minneapolis, Minn., as follows:

From Des Moines over U. S. Highway 69 to Ames, Iowa, thence over U. S. Highway 30 to Colo., Iowa, thence over U. S. Highway 65 via Albert Lea, Minn., to Owatonna, Minn. (also from Albert Lea over U. S. Highway 16 to Austin, Minn., thence over U. S. Highway 218 to Owatonna), and thence over U. S. Highway 65 to Minneapolis, and return over these routes.

Between Farmington, Minn., and St. Paul, Minn.:

From Farmington over Minnesota Highway 218 to St. Paul, and return over the same route.

Service is authorized to and from all intermediate points other than Austin, Minn., on the above-specified routes.

Between Hutchinson, Kans., and Dodge City, Kans.:

From Hutchinson over U. S. Highway 50S to junction Kansas Highway 14, thence over Kansas Highway 14 to Arlington, Kans., thence over unnumbered highway via Langdon, Turon, and Preston, Kans., to Iuka, Kans., thence over U. S. Highway 281 to Pratt, Kans., thence over U. S. Highway 54 to Backlin, Kans., thence over unnumbered highway to junction U. S. Highway 154, and thence over U. S. Highway 154 to Dodge City, and return over the same route.

Service is authorized to and from all intermediate points.

Between Kansas City, Mo., and Des Moines, Iowa:

From Kansas City over Alternate U. S. Highway 69 to junction U. S. Highway 69, thence over U. S. Highway 69 to Des Moines, and return over the same route.

Service is authorized to and from the intermediate points of Cameron, Mo., and Indianola, Iowa; and the off-route point of Kansas City, Kans.

The operations authorized over the above-specified routes are subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of The Chicago, Rock Island and Pacific Railway Company, and shall not unduly restrain competition.

*General commodities*, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Des Moines, Iowa, and Omaha, Nebr.:

From Des Moines over U. S. Highway 6 to Omaha, and return over the same route.

From Des Moines over U. S. Highway 6 to Between Des Moines, Iowa, and Silvis, Ill.:  
junction Illinois Highway 92, thence over Illinois Highway 92 to Silvis, and return over the same route.

Service is authorized to and from the off-route points of Cedar Rapids, Muscatine, Bettendorf, and Oxford, Iowa.

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Service is authorized to and from the intermediate points on the above-specified routes which are also stations on the lines of The Chicago, Rock Island and Pacific Railway Company.

Between Kansas City, Mo., and Atchison, Kans.:

From Kansas City over U. S. Highway 40 to Victory Junction, Kans., thence over U. S. Highway 73 to Atchison, and return over the same route.

Service is authorized to the intermediate points of Lansing, Wadsworth, Leavenworth, and Fort Leavenworth, Kans.

Between Kansas City, Mo., and Topeka, Kans.:

From Kansas City over U. S. Highway 24 to Topeka, and return over the same route.

Service is not authorized to and from intermediate points.

The operations authorized on the above-specified routes are subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplementary to the train service of The Chicago, Rock Island and Pacific Railway Company and shall not unduly restrain competition.

Between Atlantic, Iowa, and Audubon, Iowa:

From Atlantic over U. S. Highway 6 to junction U. S. Highway 71, thence over U. S. Highway 71 to Audubon, and return over the same route.

Service is authorized to and from all intermediate points.

Between Omaha, Nebr., and Griswold, Iowa:

From Omaha across the Missouri River to Council Bluffs, Iowa, thence over Iowa Highway 100 to Griswold, and return over the same route.

Service is authorized to and from the intermediate points of Council Bluffs, Treynor, and Carson, Iowa.

Between Hutchison, Kans., and Pratt, Kans.:

From Hutchison over Kansas Highway 17 to junction U. S. Highway 54, thence over

U. S. Highway 54 to Pratt, and return over the same route.

Service is not authorized to or from intermediate points.

Between points in Texas, as follows:

From Forth Worth over Texas Highway 121 to Birdville, Tex., thence over Texas Highway 15 via Hurst and Euless, Tex., to Brittan Road, thence over Brittan Road to Irving, Tex., and thence over Industrial Boulevard to Dallas, and return over the same route.

Service is authorized to and from the intermediate points of Hurst, Euless, and Irving, Tex.

From Hurst over unnumbered highway to Irving, and return over the same route.

Service is authorized to and from the intermediate point of Tarrant, Tex.

From Euless over unnumbered highway to Tarrant, and return over the same route.

Service is not authorized to or from intermediate points.

Service authorized herein is subject to the following conditions:

The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of The Chicago, Rock Island and Gulf Railway Company.

Applicant shall not serve, nor interchange traffic at, any point not a station on the rail line of The Chicago, Rock Island and Gulf Railway Company, except Euless, Tex.

Shipments transported by applicant shall be limited to those which it receives from or delivers to The Chicago, Rock Island and Gulf Railway Company, under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

All contractual arrangements between applicant and The Chicago, Rock Island and Gulf Railway Company or The Chicago, Rock Island and Pacific Railway Company shall be reported to the Commission and shall be sub-

ject to revision, if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties.

Such further specific conditions as the Commission, in the future, may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service.

Between Griswold, Iowa, and junction Iowa Highway 48 and U. S. Highway 6:

From Griswold over Iowa Highway 48 to junction U. S. Highway 6, and return over the same route.

Service is not authorized to or from intermediate points.

Service is authorized to and from the off-route point of Lewis, Iowa, to be served from U. S. Highway 6.

Between points in Iowa:

From junction U. S. Highway 59 and Iowa Highway 100 over U. S. Highway 59 to junction U. S. Highway 6, and return over the same route.

Service is not authorized to or from intermediate points.

Between Davenport, Iowa, and Clinton, Iowa:

From Davenport over U. S. Highway 67 to Clinton and return over the same route.

Service is authorized to and from all intermediate points.

Between Davenport, Iowa, and Muscatine, Iowa:

From Davenport over U. S. Highway 61 to Muscatine, and return over the same route.

Service is authorized to and from all intermediate points; and the off-route points of Moline, East Moline, and Rock Island, Ill.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and the failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede the certificates issued to the above-named car-

rier under Docket Nos. MC 29130 Sub. 4, and MC 29130 Sub 15 on April 23, 1940 and December 16, 1940, respectively, and those issued to the predecessors in interest under Docket Nos. MC 14130 Sub 1, MC 2262 Sub 1, and MC 2262 Sub 2 on September 10, 1940, March 25, 1940, and August 2, 1940, respectively, which are hereby canceled; the three latter certificates having been duly transferred to the above-named carrier, as set forth in the footnote appended hereto.

By the Commission, division 5.



W. P. BARTEL,  
*Secretary.*

(SEAL)

\* This certificate also embraces (1) the operating rights previously granted the above-named carrier under Docket Nos. MC 29130 Sub 4, MC 29130 Sub 12; MC 29130 Sub 14, and MC 29130 Sub 15; (2) Docket No. MC 29130 Sub 11 assigned to cover that portion of the operating rights under Docket No. MC 2181 Sub 5 purchased by said carrier from Burlington Transportation Company (Docket No. MC 2181 Sub 5 was assigned to cover that portion of the operating rights under Docket No. MC 80924 purchased from Bell Transfer, Incorporated, pursuant to MC-F-365), pursuant to MC-F-468, approved June 20, 1938; (3) Docket No. MC 29130 Sub 13 assigned to cover that portion of the operating rights under Docket No. MC60123 purchased by said carrier from William F. Peterson, dba A and A Truck Lines, pursuant to MC-F 777, approved May 13, 1939; and (4) the operating rights purchased by said carrier from (a) Clinton, Davenport & Muscatine Railway Company, a corporation, Docket Nos. MC 14130 and MC 14130 Sub 1, and (b) George Frank, Peal Frank, Administratrix, and E. R. Brillhart, a partnership Docket Nos. MC 2262 Sub 1, MC 2262 Sub 2, and a portion of Docket No. MC 2262, pursuant to MC-F 1305 and MC-F 1327, respectively, both approved February 20, 1941; and the consolidations noted on the orders previously issued under Docket Nos. MC 29130, MC 29130 Sub 12, and MC 29130 Sub 14 and the consolidation noted on the certificate previously issued under Docket No. MC 2262 Sub 1.

*Exhibit 7*

REPORT AND ORDER OF DIVISION 4 AUTHORIZING THE  
 FREDERICKSON ACQUISITION, MC-F-2327, DATED  
 NOVEMBER 28, 1944.

- 87 This report will not be printed in the permanent series  
 of Motor Carrier reports of the Commission.

INTERSTATE COMMERCE COMMISSION.

No. MC-F-2327.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
 (JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
 CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
 PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON.

Submitted November 17, 1943. Decided November 28, 1944.

Purchase by The Rock Island Motor Transit Company of  
 certain operating rights and property of J. H. Frederick-  
 son and D. H. Frederickson, doing business of J. H.  
 Frederickson & Son, and acquisition of control of said  
 operating rights and property by The Chicago, Rock  
 Island and Pacific Railway Company (Joseph B. Fleming  
 and Aaron Colnor, trustees) through said purchase, ap-  
 proved and authorized, subject to condition.

Martin L. Cassell, Jr., for vendee.

Lyle R. Higgins, for vendors.

A. C. Miller, for intervenor.

REPORT OF THE COMMISSION.

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER.

By DIVISION 4:

The Rock Island Motor Transit Company, of Chicago,  
 Ill., herein called Transit, and J. H. Frederickson and D. H.  
 Frederickson, partners, doing business as J. H.

88 Frederickson & Son, of Harlan, Iowa, by joint appli-  
 cation filed October 5, 1943, seek authority under sec-  
 tion 5, Interstate Commerce Act, for purchase by the former  
 of certain operating rights and property of the latter for  
 \$6,500. Transit is controlled through ownership of its entire  
 outstanding capital stock by The Chicago, Rock Island and  
 Pacific Railway Company (Joseph B. Fleming and Aaron  
 Colnor, trustees), also of Chicago, herein called the rail-  
 road. By supplemental application filed October 27, 1943,  
 the trustees of the railroad seek authority under the same

section to acquire control of said operating right and property of vendors through the proposed purchase. Hearing has been held at which a motor carrier intervened but did not oppose the application. The parties waived service of an examiner's proposed report.

Transit's corporate history and relationship with the railroad are described in *Rock Island Motor Transit Co.—Purchase—Corpier*, 39 M. C. C. 561, and the case therein cited. Transit operates in interstate or foreign commerce as a motor-vehicle common carrier of passengers and property. The instant application involves an extension of its freight operations which are conducted pursuant to certificates issued in No. MC-29130 and various sub-numbered proceedings, principally over regular routes which generally parallel the railroad in Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee, and Texas. One such route, over U. S. Highway 6, across Iowa from Davenport to Council Bluffs, via Des Moines and Atlantic, immediately parallels the line of the railroad, except between Atlantic and Council Bluffs, between which points the highway diverges to the south. Certain of Transit's present freight operations are subject to the limitation that service shall be solely that which is auxiliary to and supplemental of the train service of the railroad,

and either that freight so handled shall have an immediately prior or subsequent rail haul by the railroad, or that it shall not be transported from, to, or between more than one of specified key points. However, its route between Atlantic and Omaha, Nebr., over U. S. Highway 6, serving all points which are stations on the railroad, is part of a route to and from Chicago, Ill., via Des Moines, acquired pursuant to authority granted in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M. C. C. 451, and is not so restricted. On the Atlantic-Omaha segment of its route, the only points which are stations on the railroad and which are served by Transit are Atlantic, Oakland, Council Bluffs, and Omaha.

In Nos. MC-29130 (Sub-No. 24TA) and MC-29130 (Sub-No. 28TA) and other sub-numbered proceedings, Transit was granted temporary authority until December 31, 1944, to transport dangerous explosives to, from, and between points on its authorized regular routes, to transport general commodities over a regular route between Hutchinson, Kans., and a naval aviation base in that State, and to perform other temporary operations principally to

defense installations. It has pending other applications<sup>1</sup> for authority under section 5 to purchase operating rights over routes in eastern Kansas. It also has pending several applications under section 207 for extension of its operating rights, including No. MC-29130 (Sub-No. 33), seeking authority to serve Corley, Iowa, a point on the routes proposed to be purchased herein from the partnership.

Pursuant to certificates issued June 7, 1941 and March 15, 1943, in Nos. MC-530 and MC-530 (Sub-No. 1), respectively, the partnership operates in interstate or foreign commerce as a motor-vehicle common carrier of

90 general commodities over regular routes between

Harlan, Iowa, and Omaha, over Iowa Highway 64, serving the intermediate points of Avoca, Minden, Neola, Underwood, Weston, and Council Bluffs, and the off-route point of Shelby, Iowa, and between Avoca and Atlantic, Iowa, over U. S. Highway 59 from Avoca to junction of U. S. Highway 6, thence over the latter to Atlantic, and return over Iowa Highway 83 to Avoca, serving the intermediate points of Hancock, Oakland, Atlantic, Marne, and Walnut, Iowa; and over irregular routes, transporting (a) household goods and emigrant movables between Harlan and points within 15 miles thereof, on the one hand, and, on the other, points in Minnesota, Nebraska, South Dakota, Missouri and Illinois, and (b) livestock, between Harlan and points within 20 miles thereof, on the one hand, and, on the other, Omaha. The partnership also holds intrastate rights under Iowa certificate No. 493, over the above-described regular routes.

On February 10, 1943, in No. MC-FC 30046, the partnership was authorized to lease for a period expiring December 31, 1946, the operating rights confirmed September 18, 1937, in No. MC-4519, covering operations as a common carrier by motor vehicle of general commodities over a regular route between Omaha and Portsmouth, Iowa, over Iowa Highways 7 and 191, serving Council Bluffs, Weston, Underwood, Neola, and Persia, Iowa, as intermediate points and the off-route point of Panama, Iowa. From Omaha to Neola, 23 miles, the leased route coincides with the partnership's route. Transit has not requested authority to assume such lease, and it will not be further considered herein.

<sup>1</sup> No. MC-F-2374, The Chicago, Rock Island and Pacific Railway Company (Joseph R. Fleming and Aaron Colnon, trustees)—Control; The Rock Island Motor Transit Company—Purchase—Rolland Kinney, and No. MC-F-2394, Same—Control; Same—Purchase—W. A. and M. K. Remmers.

Under option agreement dated August 23, 1943, Transit would purchase for \$6,500, all of the partners' above-described regular-route, general-commodity operating rights covered by the certificates issued in Nos. 91 MC-530 and MC-530 (Sub-No. 1), corresponding intrastate rights under Iowa certificate No. 493, and 1 truck, 1 tractor, and 1 semitrailer. One dollar of the purchase price has been paid and the balance would be payable within 30 days after approval herein. The operating rights are valued by the parties at \$3,500, the truck at \$1,000, tractor \$1,200, and the trailer \$800.

The railroad's general balance sheet as of September 30, 1943, shows assets aggregating \$593,968,147, consisting of: Investments \$481,233,926, chiefly investment in road and equipment \$372,797,121, and investments in affiliated companies \$106,164,106; current assets \$95,117,128, principally cash, temporary cash investments and material and supplies; deferred assets \$826,785; and unadjusted debits \$16,790,308. Liabilities were: Capital stock \$128,892,512; long-term debt \$305,462,727; current liabilities \$29,970,759, chiefly accrued tax liability; deferred liabilities \$115,941,893, principally matured interest in default; unadjusted credits \$65,786,298, including accrued depreciation on road and equipment \$56,766,819; and corporate surplus (debit balance) \$52,086,042. Its income statements for 1941, 1942, and the first nine months of 1943, show net income of \$4,153,987, \$20,024,394, and \$23,012,502, respectively.

Transit's balance sheet as of September 30, 1943, shows assets aggregating \$679,068, consisting of: Current assets \$275,633, chiefly cash \$89,743, and accounts receivable \$144,834; carrier-operating property, less depreciation, \$267,037; intangible property, less amortization, \$65,169; investments and advances—associated companies \$3,545; and deferred debits \$67,684, chiefly prepayments. Liabilities were: Current liabilities \$198,289, principally accounts payable \$133,136 and wages payable \$35,710; advances payable—associated companies \$412,631; deferred credits \$556; injuries, loss and damage reserve \$3,172; common capital stock \$100,000; and earned surplus (debit balance) \$35,580. Its income statements for 1941, 1942, and the first nine months of 1943, show net income, after provision for income taxes of \$10,333, \$107, and deficit of \$2,384, respectively.

The partnership's balance sheet as of October 31, 1943, shows assets aggregating \$2,686, consisting of: Current

assets \$1,420, chiefly cash \$290 and accounts receivable \$749; and carrier-operating property, less depreciation, \$1,266. Liabilities were: Partnership capital \$2,686. Its income statements covering general-commodity operations for 1941, 1942, and the first ten months of 1943 show net income of \$4,255, \$3,772, and \$1,382, respectively.

J. H. Frederickson and his son engage in other enterprises, among which are wholesale tobacco, service station, warehouse and storage, and local transfer businesses, management of which is divided between the partners. The father, however, has been sole manager of the transportation business, and because of the condition of his health, has been advised by his physician to dispose of some of his operations. The partnership owns eleven pieces of equipment, and the vehicles not included in the instant transaction would be used in transporting household goods and livestock under the retained irregular-route authority, and in other businesses. Transit would offer employment to employees of the partners engaged in the operations involved who desire employment with Transit.

Transit operates five or six daily schedules over U. S. Highway 6 across Iowa: West of Atlantic, U. S. Highway 6 passes through Oakland, a point on a north-south branch line of the railroad between Harlan and Carson, Iowa, which crosses the main line of Avoca. The routes to be purchased from the partnership parallel the railroad between Atlantic and Omaha and between Harlan and 93 Oakland, and every point authorized to be served by the partnership is a station on the railroad's main or branch lines lying between Atlantic and Omaha.

Omaha is an important jobbing center for the territory. The partnership serves 10 points,<sup>2</sup> having a combined population of approximately 9,000, which are not presently served by Transit, but which are stations on the railroad where terminal facilities are maintained and would be utilized by Transit. Harlan, the largest of such points, is the northern terminus of the branch line of the railroad, above mentioned, and has 3,700 inhabitants. Several motor carriers serve the considered area and all of the points on the routes here involved, although no single carrier serves all points served by the partnership. Four points, Harlan, Underwood, Minden, and Neola, are served by other railroads.

<sup>2</sup> Harlan, Avoca, Walnut, Marne, Hancock, Shelby, Minden, Neola, Underwood, and Weston.

Under present conditions, l. c. l. freight eastbound from Omaha to points on the partnership's route between Omaha and Atlantic, is transported by Transit to Atlantic where it is backhauled and distributed by westbound local train. Des Moines, rather than Atlantic, has been used as the breakbulk point on westbound rail freight for this territory. The railroad does not operate a local eastbound train. If such freight is destined to a point on the Harlan-Oakland branch lines of the railroad, it is again transferred at Avoca. Such combination service by Transit and the railroad at points between Omaha and Atlantic on the partnership's route requires two or three days depending upon connections. If the authority sought is granted, Transit proposes to provide all-truck service eastbound from Omaha to points on the route acquired, resulting in expediting delivery in some instances by as much as two days. For certain of the considered points it would

94 also provide the only single-line motor-carrier service from more distant manufacturing and jobbing centers such as the Twin Cities and Chicago. A study made by an operating official of the railroad shows that savings of 38,157 car miles per annum and approximately \$5,000 in overtime expense to the railroad would result. Approximately 100 freight cars per month would be released to handle carload traffic of the railroad, with corresponding reduction of congestion in terminals, more efficient use of manpower, and faster movement of all of the railroad's traffic. No train-miles would be saved.

A representative of the Omaha Chamber of Commerce, and a number of shippers from several points on the routes involved, testified in support of the application, expressing a need for expedited service resulting from coordinated rail and motor service for reduction in handling in transit, and other advantages to be derived from single-line service and responsibility, such as simplification of claim adjustments.

The partnership's circular route from Avoca to Atlantic via Oakland, and return via Walnut, duplicates Transit's present route between Oakland and Atlantic, 28 miles, although service is authorized by the partnership on such duplicate segment in an eastbound direction only. It should also be noted that the partnership's rights from Atlantic to Avoca permit westbound service only. If the transaction is approved, Transit plans to re-route at least one of its daily schedules now operated over U. S. High-

way 6 so as to render daily service to points west of Atlantic into Omaha. Due to the one-way character of the authority involved, it would be necessary to route east-bound schedules from Omaha via Neola to Avoca, thence south to Oakland, and east to Atlantic. In connection with the routes to be acquired, break-bulk points have not yet been determined, but the railroad's traffic, as well as that of Transit, is concentrated principally at Des Moines and secondarily at Omaha at the present time. Because of the relatively short distances involved between Atlantic and Omaha over the partnership's routes, 73 miles eastbound and 54 miles westbound, Transit considers it impractical to perform motor-carrier service over the routes to be acquired if such operations are limited solely to the handling of freight having an immediately prior or immediately subsequent rail haul, and, further, that any such limitation would be expensive and would result in tying up railroad equipment. As stated, Transit is already authorized to render an unrestricted all-truck service between Atlantic and Omaha over U. S. Highway 6 as part of its operations between Chicago and points west of Omaha. Hence the naming of Atlantic and Omaha as key points between, or to or from more than one of which service would be prohibited over the partnership's routes would not prevent long-haul all-truck service via both points over Transit's present route, or the serving of both points on all-truck freight. It is clear that the l. c. l. service of the railroad to and from points on the partnership's routes is uneconomical, inefficient, and slow, and that the motor-vehicle facilities of Transit can be used to the advantage of the railroad and the shipping public by speeding up deliveries at such points and releasing rail cars for other service.

Transit proposes to amortize in equal monthly installments over a period of five years the amount of increase in its "Other Intangible Property" account resulting from the instant transaction, and our findings will be conditioned accordingly.

We find that purchase by The Rock Island Motor Transit Company of the previously described operating rights and property of J. H. Frederickson and D. H. Frederickson, partners, doing business as J. H. Frederickson & Son, and that acquisition of control of said operating rights and property by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and

Aaron Colnon, trustees) through said purchase, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2) (a), will be consistent with the public interest, will enable The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that if the transaction is consummated, The Rock Island Motor Transit Company will be entitled to a certificate covering the previously-described portion of rights granted in Nos. MC-530 and MC-530 (Sub-No. 1), which rights are herein authorized to be unified with rights otherwise confirmed in The Rock Island Motor Transit Company, with duplications eliminated; *provided, however, that* if the authority herein granted is exercised, The Rock Island Motor Transit Company shall amortize in equal monthly amounts over a maximum period of five years, commencing with the date of consummation herein, the amount of increase in its "Other Intangible Property" account resulting from the instant transaction, in a manner consistent with the provisions of the Uniform System of Accounts for Class 1 Motor Carriers, or in lieu of amortization in any month of the 5-year period, it may write off to surplus the unamortized balance of the increase in its "Other Intangible Property" account, so as to remove from such account within said 5-year period, either through amortization or write-off, the entire amount of the increase.

An appropriate order will be entered.

97

## ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C. on the 28th day of November, A. D. 1944.

No. MC-F-2327.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY (JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES)—CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON.

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its

findings of fact and conclusions thereon, which report is made a part hereof:

*It is ordered* That purchase by The Rock Island Motor Transit Company, of Chicago, Ill., of certain operating rights and property of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son, of Harlan, Iowa, and acquisition of control of said operating rights and property by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees), also of Chicago, through said purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

*It is further ordered*, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission, in writing, of the intended consummation date; (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm in writing to the Commission immediately after consummation, the date on which consummation has actually taken place.

*It is further ordered*, That unless the authority herein granted is exercised within 180 days from the date hereof, this order shall be of no further force and effect.

*It is further ordered*, That recital in said report of balance-sheet and other financing data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

*It is further ordered*, That before recording the purchase upon its books, The Rock Island Motor Transit Company shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

*And it is further ordered*, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act except section 5 thereof, as expressly determined herein.

By the Commission, division 4.

(SEAL)

W. P. BARTEL,  
Secretary.

*Exhibit 8.*

99

REPORT AND ORDER OF DIVISION 5 ON REOPENING, DATED  
MARCH 4, 1946.

101

## INTERSTATE COMMERCE COMMISSION

No. MC-F-445.<sup>1</sup>

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED,  
ET AL.

Decided March 4, 1946.

Upon reconsideration, the certificate issued in No. MC-29130, insofar as it embraces motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-445, prior reports 5 M. C. C. 451, and 15 M. C. C. 763, ordered modified, and the certificate to be issued covering the motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-2327, prior report 39 M. C. C. 824, ordered framed, in a manner as to subject the motor common carrier operations thereunder to stated conditions or restrictions calculated to insure that the service given shall be limited to that which is auxiliary to, or supplemental of, train service.

Appearances as shown in prior reports, also: *H. L. Lewis* and *R. J. McBride* for intervenor.

102 REPORT OF COMMISSION ON RECONSIDERATION. <sup>2</sup>

## BY THE COMMISSION:

The Rock Island Motor Transit Company of Chicago, Ill., hereinafter called Transit, is a wholly-owned subsidiary of The Chicago, Rock Island, and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees), a common carrier by railroad subject to Part I of the Interstate Commerce Act, hereinafter called the railroad. It operates, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers between

<sup>1</sup>This report also embraces No. MC-F-2327. The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, and No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Co., Common Carrier Application.

Bureau and Peoria, Ill., and as a common carrier by motor vehicle of property over regular routes which follows generally the lines of the railroad in Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee, and Texas. Certain of its motor carrier operations are conducted under authority acquired by purchases approved and authorized by this Commission under former section 213 and under section 5 of the act. Others are conducted under authority acquired by various applications under section 207.

When the Motor Carrier Act, 1935, became effective Transit was not in operation. Its first authority to operate as a common carrier by motor vehicle of property was acquired by purchase from White Line Motor Freight Company, Incorporated, hereinafter called White. This purchase was approved and authorized under former section 213 on April 1, 1938, in the title proceeding herein, 5 M. C. C. 451, and 15 M. C. C. 763. By the operating authority so acquired, which is now embraced in the certificate issued in Docket No. MC-29130 (which replaced White's application No. MC-49147), Transit is authorized to operate, subject to certain conditions hereinafter discussed, as  
 103 a common carrier by motor vehicle of general commodities, with exceptions not here important, between Omaha, Nebr., and Silvis, Ill.,<sup>2</sup> over a regular route through Des Moines and Davenport, Iowa, consisting of U. S. Highway 6 between Omaha and the junction of U. S. Highway 6 and Illinois Highway 92 not far from Davenport, Iowa, and Illinois Highway 92 between this junction and Silvis, with service at all intermediate points on the route and at the off-route points of Cedar Rapids, Muscatine, Bettendorf, and Oxford, Iowa.

Subsequent to his original purchase from White, Transit by other purchases and by applications under section 207 of the act, acquired additional motor common carrier operating authority. It now operates, subject to various restrictions affecting different route segments, a system of regular through routes and feeder routes, extending between the Twin Cities and Chicago, on the one hand, and, on the other hand, Omaha and Kansas City, Mo., and points beyond as far west as Goodman, Kans., and certain other routes in Texas and Arkansas. We are concerned here only with the first-purchased Omaha-Silvis

<sup>2</sup> The claimed rights of vendor White between Silvis and Chicago, Ill., were not proved.

segment of Transit's now authorized Omaha-Chicago routes and with a segment of alternating route (between Omaha and Atlantic, Iowa,) the purchase of which was approved and authorized in No. MC-F-2327 mention in footnote 1.

As disclosed by the original report in the title case, 5 M. C. C. 451, Transit in seeking authority for this original purchase from White represented that its proposal sprung primarily from a desire to conduct a rail-coordinated motor service and thereby to improve the railroad's service to the public with the hope of retrieving less-than-carload traffic which had been lost by the railroad to motor carriers. It offered to abandon any operating rights  
104 of the vendor except those over the highway routes which closely paralleled the railroad's main Omaha-Chicago rail line, and those to and from Cedar Rapids and Muscatine, Iowa, both of which are also served by the railroad. It proposed to conduct three distinct types of service (1) a coordinated rail-truck service, which was to be auxiliary to existing all-rail service and in which merchandise cars would be moved to certain set-out points from which distribution would be made by truck; (2), an all-motor-service on short hauls between stations, where feasible and economical, as a substitute for rail service; and (3) an all-motor service restricted to points on the railroad, but in addition to, rather than as a substitute for, rail service. The manner in which it was proposed to effect coordination of truck and rail service and the advantages resulting from such coordination were shown in detail.

Division 5 found that the general plan of operation proposed was similar to that outlined in *Pennsylvania Truck Lines, Inc. —Control—Barker M. Frt.*, 1 M. C. C. 101, 5 M. C. C. 9, and 5 M. C. C. 49, hereinafter called the *Barker case*, wherein authority for the acquisition of motor common carrier operating authority by a railroad subsidiary had been conditioned so as to permit service by the railroad subsidiary under the acquired rights only at points which were stations on the railroad and, accepting Transit's offer to abandon all rights to serve points not on the railroad, approved and authorized the proposed purchase subject to conditions: (1) That Transit should not render service from, or to, or interchange traffic at, any point other than a station on the lines of the railroad, and (2) that the authority granted should be subject to such fur-





ther limitations, restrictions, or modifications, as we might find it necessary to impose in order to insure that the service rendered should be limited to that auxiliary to, or supplemental of, train service and should not unduly restrain competition

105 Among the routes acquired by Transit since its original purchase from White are a number of alternate, feeder, and main-line routes which connect with its Omaha-Silvis route. Some of these were acquired by purchase and others in proceedings under section 207. To the time of the prior report in No. MC-F-2327, operation by Transit over each of its routes, however acquired, was subject without any important exceptions<sup>3</sup> to either definite conditions or restrictions calculated to insure that the service rendered should be limited to that which is auxiliary to, or supplemental of, service of the railroad or to a reserved right in this Commission in the future to impose such restrictions as may be necessary to insure that the service rendered shall be so limited. In the appendix hereto there are listed Transit's Omaha-Silvis operation and all of the operations connecting therewith together with a showing as to the conditions or restrictions attached to each of the operations.

The routes authorized to be purchased in the prior report in No. MC-F-2327 follow the line of the railroad between Omaha and Atlanta much more closely than do Transit's now authorized routes between the same points and will apparently become Transit's principal route between these points. The failure to restrict Transit's contemplated service over this route, which alternates with a segment of its Omaha-Silvis route acquired pursuant to authority granted in No. MC-F-445, to that which is auxiliary to, or supplemental of, the train service of the railroad, or to reserve the right so to restrict it in the future, if such reservation of authority is necessary, appears to be inconsistent with the principles which controlled the disposition of No. MC-F-445. Accordingly, to enable us to examine the matter further, by an order entered February 5, 1945, we re-

106 opened No. MC-F-2327, also Transit's original application No. MC-F-445, and No. MC-29130 to the extent it embraces operating rights acquired pursuant to order entered in No. MC-F-445, for reconsideration on the pres-

<sup>3</sup> The sole exceptions are three short branch-line operations (Iowa City-Wellman, Davenport-Clinton-Muscataine, and Atlantic-Audubon) and the short Omaha-Griswold segment of alternate route.

ent records, solely to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor-carrier service performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the condition, if any appears necessary, which should be imposed to make the authority granted to Transit subject to such further conditions or restrictions as we may find necessary to impose in order that the service shall be auxiliary to, or supplemental of, rail service.

By order entered March 17, 1945, the Regular Common Carrier Conference of the American Trucking Associations, Inc., was permitted to intervene. It represents that it is an association organized principally to foster, protect, and defend the interests of regular-route common carriers of property by motor vehicle and to advance their interests through cooperation and organization. The application in No. MC-F-2327 was not opposed at the hearing, and the transaction authorized by the prior report and order therein has been consummated but a certificate covering the acquired rights has not as yet been issued.

The Motor Carrier Act, 1935, now Part II of the Interstate Commerce Act, as originally passed, section 202(a) thereof, declared it to be the policy of the Congress "to regulate transportation by motor carriers in such a manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers \* \* \* ; promote adequate economical, and efficient service by motor carriers, \* \* \*, without \* \* \* unfair or destructive competitive practices; improve the relations between and coordinate transportation by, and regulation of; motor carriers and other  
107 carriers; [and] develop and preserve a highway transportation system properly adapted to the needs of commerce \* \* \* and of the national defense."

Consistently with, and obviously in furtherance of, this policy, it was specifically provided by section 213 that no "carrier other than a motor carrier" nor any person controlled by, or affiliated with, any "carrier other than a motor carrier" should be authorized to consolidate or merge with, purchase, lease, operate under contract, or otherwise acquire control of, any motor carrier unless this Commission should first find not only that the transaction would be consistent with the public interest but further that it would "promote the public interest by enabling such

carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations" and would not unduly restrain competition.

By these provisions of the law the Congress indisputably intended not only to provide for the impartial regulation of *all* of the indicated modes of transportation but also affirmatively to foster, promote, and preserve the inherent advantages of each mode of transportation. As an essential element of the latter purpose provision was specifically made to protect each mode of transportation from the suppression or strangulation thereof which might follow if control thereof were allowed to fall into the hands of a competing transportation agency. At the same time it was recognized that motor vehicles legitimately and properly could be used as a subordinate instrumentality for the improvement of non-motor-carrier transportation services. In order to allow such use in the public interest, the way was left open for carriers other than motor carriers, with this Commission's approval, to acquire control of motor carriers, but it was provided that such acquisition should not be sanctioned unless it first be found that the  
 108 "transaction proposed would *promote* the public interest," and that, in a particular way, namely, "by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its (non-motor-carrier) operations" and would not unduly restrain competition.

After nearly 5 years of regulation under the Motor Carrier Act, 1935, in the course of which section 213 was construed and applied and during which effect was given in proceedings under section 207 of the act to the declared policy of the Congress as confirmed and furthered by section 213, the Transportation Act, 1940, was enacted. Therein the previously declared policy of the Congress was broadened somewhat to cover all modes of transportation and restated as the national transportation policy. At the same time section 213 was revised slightly and consolidated with section 5 of part I of the act.

In view of the intervening administrative construction and application of the declared policy of the Congress and of section 213 it is particularly significant that both the new declaration of policy and the revised section 5 were so framed as to confirm and approve, rather than disapprove, the manner in which those portions of the act had theretofore been construed and applied by us. Specifically the Transportation Act, 1940, declared it to be the national

transportation policy impartially to regulate "all modes of transportation" so as "to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment of reasonable charges \* \* \* without \* \* \* unfair or destructive competitive practices; \* \* \* all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail \* \* \*." Section 5 as

109 amended to include former section 213, again provided that an acquisition of a motor carrier by a railroad or by any person controlled by, or affiliated with a railroad, should not be approved except after a finding "that the transaction proposed will be consistent with the public interest and will enable such rail carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition".

Appraisal of the scope of the legislative approval of our prior administrative construction and application of the declared policy of the Congress and of section 213 which can be implied from the reenactment of both provisions without substantial change requires a brief examination of, at least, the leading reports of this Commission bearing thereon which antedated such reenactment.

The first important proceeding involving an application under section 213 by a railroad or railroad-affiliate for authority to acquire control of a motor carrier was the *Barker case*. Therein an affiliate of the Pennsylvania Railroad sought authority to acquire control of Barker Motor Freight, Incorporated, a motor common carrier with regular- and irregular-route "grandfather" operations in Ohio, Michigan, West Virginia, Kentucky, Indiana, and Pennsylvania. Although the railroad's declared "primary purpose" in acquiring Barker's motor carrier operating rights was to facilitate the establishment of a coordinated truck-and-rail service in Ohio similar to that already furnished by it in territory east thereof, it did not, however, propose to abandon or dispose of those portions of the vendor's motor operations which would not contribute to coordinated truck-rail service. Instead, it argued that its greater financial resources, equipment, and other facilities would permit it to give improved and more frequent motor service over all the routes previously operated by

110 Barker including those not adjacent to Pennsylvania rails. Division 5 after pointing out that under sec-

tion 213 the proposed acquisition must not only be consistent with the public interest but must also be such as would "actively promote the public interest and in a particular manner, namely, by enabling the acquiring [rail] carrier 'to use service by motor carrier to public advantage in its operations'"; found that some of Barker's routes could be used by the railroad to public advantage, but concluded generally that future healthy competition between rail and truck service required disapproval of any proposal of railroads "to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, the rail operations". The following excerpt from the report, 1 M. C. C. 101, 111, (with emphasis added) is significant:

Section 213 of the Motor Carrier Act, 1935, provides with respect to consolidations, mergers, and acquisitions of control that if the applicant be a carrier other than a motor carrier (*e. g., a* railroad), or a company controlled by or affiliated with such a carrier other than a motor carrier, we shall not give our approval unless we find "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." In other circumstances it is only necessary, under section 213, to find that the transaction proposed "will be consistent with the public interest." It is the obvious intent of the act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation and no doubt railroads were particularly in mind. The proof in such cases must show, not merely that what is proposed is *consistent* with the public interest, but that it will actively *promote* the public interest and in a particular manner, namely, by enabling the acquiring carrier "to use service by motor vehicle to public advantage in its operations." The proof  
 111 must further show that the acquisition will not "unduly restrain competition."

The proof is convincing that over some of the routes in question the railroad can "use service by motor vehicle to public advantage in its operations." The motor vehicle can undoubtedly be used as a very valuable *auxiliary or adjunct to railroad service*, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such coordination of rail and

motor-vehicle operations should be encouraged. The result will be a *new form of service* which should prove of much public advantage. Nor do we believe that the creation of this *new form of service* will "unduly restrain competition." On the contrary, it should have the opposite effect.

The railroad does not, however, so far as the routes in question are concerned, propose to confine itself to motor-vehicle service auxiliary to its rail operations. It contemplates also the furnishing of motor-carrier service which would not be associated in this way with rail operations, pointing out that with its financial and other resources it would be able to expand and improve very materially the service which the partnership has been furnishing. As evidence that this would not "unduly restrain competition," it further points, as we have seen, to the large number of competing motor carriers now operating in the same territory.

While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, *we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations.* The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck

112 service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that, and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

In view of the considerations indicated, approval of the acquisition was withheld until receipt of notice of acceptance of certain conditions including: (1) a condition that the motor service which would be rendered under the

acquired authority should be confined "to service auxiliary and supplementary to that performed by the Pennsylvania Railroad Company in its rail operations and in territory parallel and adjacent to its rail lines", (2) a condition that Barker submit "a statement of the routes and a description of the territory over, and within which, it proposed to establish and operate such auxiliary and supplementary service", and (3) a requirement that Barker submit a statement of its proposed arrangements for divestment of all of the acquired rights which should not be used in the performance of service auxiliary to, and supplementary of, the train service of the Pennsylvania Railroad.

These conditions were accepted but the statement submitted of the routes proposed to be operated was not satisfactory and in a supplemental report, 5 M. C. C. 49, the intent of the original report was restated by Division 5 as follows (emphasis added):

The scope of the operations proposed to be retained is broader than intended by the conditions we stated in our prior report. Hence, it will be of advantage to the parties in this and later proceedings

113 if we here amplify the meaning of those conditions.

*Approved operations are those which are auxiliary or supplementary to train service. Except as herein after indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.*

Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called "station-to-station" service. In that connection the shortest distance between two rail terminals, in terms of available travel routes, is sometimes by rail and other times by highway. Alternate highway routes of varying degrees of circuitry also usually exist, and, of the latter, that one which most closely parallels the interested rail line ordinarily will be regarded as most appropriate for auxiliary rail service, but this may not always be true. Sometimes the round-about character of a rail line is such that use in rail auxiliary service of a non-parallel shortcut highway is clearly in the public interest, and instances of this character are later mentioned.

On the other hand, the presumption should be against a highway route which exceeds by more than

20 percent the rail distance between points of substituted rail service; and, from the standpoint of an applicant railway *an intermediate off-rail point on a permissive route, whatever its direct or indirect character, should not be served if it already is receiving adequate service from a rail or highway common carrier.* The evidence shows that, over each of the routes here considered, service already is being performed by at least three motor carriers. Hence our order will provide, in connection with the routes here authorized, that *service by applicants' motor vehicles may not be accorded to, or traffic interchanged at, any point which is not also a station on the Pennsylvania,* but this restriction is without prejudice to subsequent modification as later explained.

114 Various routes were thereafter discussed and specific routes, operation on which by the railroad would be approved, were set forth in an appendix and applicants were advised that if "they deemed the imposed conditions too onerous, it would appear that they should refrain in the first instance from exercising the permissive authority granted". Consideration by the entire Commission of the case just discussed was never sought, but it was very early quoted by us with approval and added emphasis in *Northland-Greyhound Lines, Inc.—Purchase—Liederbach*, 5 M. C. C. 215.

From the date of the decision in the *Barker case* to shortly before enactment of The Transportation Act, 1940, the principles there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. During the period indicated approximately 40 of such cases were decided. In each of them approval of the proposed acquisition was made subject, except in unusual circumstances,<sup>4</sup> to the condition that in operations

<sup>4</sup> Cases in which future service was not restricted to rail points fall into three classes of natural exceptions to the *Barker case* principles, namely, (1) those in which the restrictions would be meaningless because all points on the acquired route were stations on the acquiring railroad, (2) those in which some of the points on the acquired routes involved, though located off-rail, were adjacent to the railroad and had no other adequate service, and (3) those in which the acquired motor carrier was in the nature of a branch or feeder line of the railroad reaching into territory not previously occupied or "permissive" territory as it is called in one case. Cases of the latter type are the most important and comprise a distinct line beginning with *Santa Fe Trails Stages, Inc.—Control—Central Arizona*, 1 M. C. C. 225. In that case, which was de-

under the acquired operating rights no service should be given to or from, or any traffic interchanged at any point not a station on the line of the acquiring railroad. And

115 in all except three instances approval was also conditioned that operation under the authority acquired should be subject to such further limitations or restrictions as we might find it necessary to impose in order to insure that service under the acquired rights should be limited to that which is auxiliary to, or supplemental of, train service.

Section 207 of the act, providing for the issuance of certificates of public convenience and necessity authorizing operations as a common carrier by motor vehicle, has never contained any provision paralleling the proviso of section 213 (now section 5) which requires special justification of acquisitions by railroads of motor carrier operating rights. Giving effect, however, to the national transportation policy as declared by the Congress, and as colored by the provisos of sections 5 and 213, it has consistently been recognized in proceedings under section 207 that the preservation of the inherent advantages of motor carrier service, the promotion of efficient motor carrier service and of sound economic conditions in the motor

Footnote 4 con't from pg. 66

cided while the *Barker case* was still pending, and is differentiated in the first supplemental report therein, a Santa Fe Railway bus-operating affiliate was permitted to acquire by purchase a motor line between Salt Lake City, Utah, and Phoenix, Ariz. The acquired line was the only carrier in that part of the territory served lying between Flagstaff, Ariz., and Salt Lake City. Most of the points served in such territory were non-rail points. The acquisition promised improved bus service, which was needed. In the circumstances it was approved "as equivalent to the building by the railroad of a branch or feeder line into a territory not hitherto occupied \* \* \*". Other cases which followed the precedent so established are: *Northern Pac. Trans.—Purchase—Fitzhugh*, 15 M. C. C. 296; *Mo. Pac. Transp. Co.—Purchase—Dardanelle Transfer*, 15 M. C. C. 303; *Pacific M. T. Co.—Purchase—Keitly*, 15 M. C. C. 427; *Burlington Transp. Co.—Purchase—Buskohl*, 15 M. C. C. 691; *Frisco Trans. Co.—Purchase—Parker*, 25 M. C. C. 96; *Rock Island Motor Transit Co.—Purchase—Peterson*, 25 M. C. C. 153; *Black Hills Stages, Inc.—Purchase—Black Hills Transp.*, 25 M. C. C. 171. The *Keitly case* extended the doctrine of the *Central Arizona case* to the extent of permitting acquisition of a right to serve a point already served by another rail carrier and not strictly in unoccupied territory, where the point involved was relatively unimportant and the invasion of another's territory was "inconsequential." In *Santa Fe Trail Trans. Co.—Purchase—Estep*, 5 M. C. C. 127, and 5 M. C. C. 145, penetration by the Santa Fe of Frisco territory was permitted, but only after the Frisco had disclaimed any interest.

carrier industry, the avoidance of unfair and destructive competitive practices, and the development of an adequate transportation system employing in coordination all available agencies make it inconsistent with the public interest, and *a priori* something not required by public convenience and necessity, for railroads directly or indirectly through an affiliate to engage, except in special circumstances, in motor carrier operations other than those auxiliary to, and supplemental of, their own train service and designed to be coordinated with train service to produce in effect a new and improved type of coordinated motor-rail service.

The leading case under section 207 is *Kansas City Southern Transport Co., Inc., Common Carrier Application*, 10 M. C. C. 221, 28 M. C. C. 5. Therein, we considered an application by an affiliate of the Kansas City Southern Railway Company for a certificate authorizing operation as a motor common carrier of general commodities over described regular routes. Although the applicant Transport Company represented that the proposed service would in all respects be auxiliary to, and supplemental of, the rail service of the Kansas City Southern Railway and coordinated therewith, it nevertheless proposed to move some shipments wholly by truck. Its proof disclosed no need for any new all-motor service but it did establish that the then existing less-than-carload or merchandise freight service of the Railway was expensive to give and in many respects unsatisfactory and inefficient; that the proposed coordinated rail-motor service would be a new and improved form of motor-rail service useful to the public and responsive to a public need; and that such service could not satisfactorily be given by the Railway using existing independent motor carriers. Discussing the question whether such new coordinated motor-rail service could be authorized "without endangering or impairing the operations of existing carriers contrary to the public interest" Division 5, citing the *Barker case* and reaffirming the principles there followed, spoke as follows:

As has been indicated, protestants contend that if applicant be given the certificate which it seeks, they will suffer severely from the new competitive service which it will offer, not only in conjunction with the railway but on its own account. Competition is already so keen in the territory concerned that protestants can ill afford any further diversion of business. They particularly fear the competition of a

motor carrier which, like applicant, would not be wholly dependent upon its own resources but would have the financial support of a parent rail company and, in addition, the benefit of the traffic-soliciting force and prestige of the latter and the use of many of its facilities. They go so far, indeed, as to assert that existence of independent motor carriers cannot in the long run be maintained, if railroads are to be allowed to go freely into the motor carrier business, and they express the belief that the inherent advantages of motor-carrier transportation cannot be preserved under such conditions. Interpreting their views, the thought seems to be that railroad-controlled motor carriers might ultimately be able to prevail over independent competitors, not because of any superiority in service or operation, but through their ability to draw upon the financial and other resources of their parent companies, and that the motor-carrier industry is more likely to develop in inherent strength and efficiency if it continues, as in the past, to remain largely in independent hands. In *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, 111, we expressed a somewhat similar thought as follows:

\* \* \* we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

Protestants now meet with the competition of the railway, but, in the case of the merchandise traffic handled in less-than-carload lots, that competition has not been particularly formidable. The railway now proposes to improve the handling of that traffic by establishing a coordinated truck-rail service in connection with applicant. As we have seen, the conclusion is warranted that there is a public need for this coordinated service, that it is a new and different character of service which neither the railroads nor the trucks alone can supply, and that it cannot be furnished effectively and well except through the use of applicant's facilities. We do not believe that the development of this new form of service will seriously endanger the operations of protestants, but, in any event, the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers. If that principle had been followed, indeed, no motor-carrier service could have been developed.

However, while it has been shown that public convenience and necessity require the establishment of a service by appellant which will be coordinated with that of the railway, the record is devoid of proof that there is any need for the institution of service by applicant which is not required in such coordinated operations. In other words, there are plenty of motor carriers in this territory and it has not been shown that there is any need whatever for another motor carrier to furnish service such as the existing carriers furnished and having no close relation to rail operations. It follows that the certificate to be granted to applicant should be limited accordingly.

119 After some further discussion of the restrictions required effectively to limit the proposed operations "to those auxiliary to, or supplemental of, rail service and to prevent it [applicant] from engaging in operations which will duplicate and compete with service now adequately provided by carriers by motor vehicle", the authority sought was granted subject to conditions substantially identical with conditions 1 to 5, inclusive, but omitting 3A, as set forth in the appendix hereto.

The original report in this proceeding was adopted November 12, 1938. From that date to the early part of 1940, it was followed consistently and substantially identical restrictions were imposed in disposing of more than a

score of railroad applications for motor carrier operating authorities.

Thus by the report of division 5 in the *Barker case*, by our report on reconsideration in the *Northern-Greyhound case*, by the report of division 5 in the *Kansas City Southern case*, and by numerous other reports, in proceedings under both sections 207 and 213, which followed the *Barker* and *Kansas City Southern* reports, our administrative construction of section 213 and of the declared policy of Congress as it affected proceedings under both sections 207 and 213 was firmly established when the Transportation Act, 1940 was before the Congress. In these circumstances the reenactment of section 213 as a part of section 5 and the restatement of the national transportation policy without any change suggesting any dissatisfaction with our established administrative construction thereof must be taken as a definite approval thereof, which speaks strongly against any significant departure therefrom in the future.

Condition 3 as originally imposed in the *Kansas City Southern case* was claimed by the carrier to be too restrictive in some instances in that it prevented use by a  
120 railroad of all-motor service in any instance and necessitated and continued use of lightly loaded way-freight trains to supply short-haul service between comparatively adjacent way points. Accordingly in a report on oral argument and reconsideration in the *Kansas City Southern case*, 28 M. C. C. 5, we revised the condition to read as follows:

3. No shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points, or through, or to, or from, more than one of said points: \* \* \* (naming so-called key points).

In this report on reconsideration we recognized that the purpose of the conditions imposed by division 5 in the original report was "to limit the motor-carrier service to that which is auxiliary to, or supplemental of, the rail service and to prevent applicants from engaging in motor-carrier operations unconnected with any rail service." Our modification of the condition indicated did not accomplish any change in the previously accepted principles and was in no way inconsistent with the implied legislative approval of our earlier administrative interpretation.

Since our report on oral argument and reconsideration in the *Kansas City Southern case*, almost without exception, every grant of any significant motor carrier operating

authority to any railroad or railroad affiliate has been made subject to conditions substantially identical with those imposed in the *Kansas City Southern case*. In some instances where a key-point condition 3 would be ineffective for some reason, a prior-or-subsequent-rail-haul condition similar to the original condition 3 has been employed. Others of the conditions also have been varied or omitted occasionally for special reasons but the fundamental principle stated in the foregoing has never been lost sight of.

As previously stated, from the date of the decision of the *Barker case* to shortly before enactment of the Transportation Act, 1940, the principles there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. However, beginning with *Frisco Transp. Co.,—Purchase—Reddish*, 35 M. C. C. 132, and continuing until quite recently, the practice of specifically reserving the right later to impose such restriction as might be necessary to insure that future operations under the acquired authority should be limited to the rendition of service auxiliary to, or supplemental of, train service not followed.<sup>5</sup> With such departure from the former practice there also appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker case* restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the service which might be rendered by a railroad or its affiliate under any acquired right.

Except for the fact that it may have been wrongly construed, the omission of a specific reservation of a right later to impose such restrictions for the purpose indicated was not particularly significant, for it appears to have been coupled with the thought that, in view of section 5(9) of the act such a reservation of authority was unnecessary and added nothing to our authority under the statute. The tendency, if such here was, in the *Reddish* report and the others which followed it, to view the *Barker case* as though the restrictions there imposed were geographic only in their application apparently finds such justification as it has in certain language in the original report in the *Barker case*. Therein the conditions attached to the tentative approval were phrased in terms of service auxiliary to, and supplemental of, service of the railroads "in territory parallel

<sup>5</sup> Except for certain cases decided very recently a restriction of the type mentioned was imposed in only three proceedings decided after the decision in the *Reddish case*.

and adjacent to its rail lines," and applicant was required to submit a "statement of the routes and description of the territory over and within which" it proposed to establish auxiliary and supplemental service. In its tender of compliance with these conditions applicant indicated that it construed "supplemental" service to mean transportation by the applicant motor carrier under its own motor carrier tariffs "filling out and supplying transportation service additional to that of the railroad". Following this tender, in a supplemental report which mentioned at various points the "invasion of the territory" of other carriers, the proposed acquisition was approved, subject, among others, to a condition that the operating authority to be acquired should not be construed as including the right of rendering service from or to, or interchanging traffic at, "any point other than a station of the Pennsylvania Railroad". Relying apparently upon the tenor of these quoted excerpts the report in the *Reddish* case discussed in detail the territorial proximity of various motor routes of the vendor to the lines of the acquiring rail-affiliated motor carrier and approved the proposed acquisition subject to the condition that the vendee should abandon all irregular-route rights of the vendor and should not in the future serve over the acquired regular routes (except one), or interchange traffic at, "any point not a station on the (acquiring) railroad if such point is more than 10 miles by highway from such a station." The formerly-attached specific reservation of authority later to impose additional restrictions necessary to insure that the future service should be limited to that auxiliary to, or supplemental of, train service was omitted; and, as above indicated, such omission marked the virtual abandonment (until again very recently) of the use of such reservation of authority in rail-motor finance cases.

Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only territorially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied. Certainly those reports following the *Barker* case and in which the right later to impose specific restrictions limiting the operations of the vendee to those auxiliary to, and supplemental of, train service furnish no basis for such thought for, if so, the reservation would have been meaningless and futile because it was the practice in those

cases specifically to require the vendee to agree to the cancellation of that part of any acquired operating authority extending into territory not served by the acquiring railroad. From a regulatory standpoint, motor carrier operations conducted by a railroad affiliate should be the same whether the authority under which they are conducted was acquired by an application under section 207 or by purchase. There is no justification whatever for rigidly restricting, as we have done since the original decision in the *Kansas City Southern case*, railroad-controlled motor carrier operations conducted under authority acquired under section 207 and at the same time allowing operation under purchased authority wholly free from all restrictions except territorial or geographical limits. Such, however, would be the illogical result of construing the *Barker case* restrictions as territorial limitations only. Moreover it would, in our opinion, be contrary to the plainly declared purpose of the reports in the *Barker case*. Despite the above-quoted references in those reports to operations within the "territory parallel and adjacent to" the rail lines of the Pennsylvania Railroad, a careful reading of each report in its entirety will show that there was no intent to allow the railroad-affiliated motor-carrier vendee to acquire any authority which would be used in the performance, even in territory parallel and adjacent to the railroad, of an all-motor service not related to, but competitive with the railroad. Compare the concurring

124 separate expression emphasizing this point in *Texas & P. Motor Transport Co.—Purchase—Johnson*, 5 M. C. C. 89, 93. As already indicated, the original *Barker* report recognized the intent of the Congress to place "special safeguards" about rail-motor acquisitions and approved the proposed acquisition, not to enable the railroad to engage in motor operations unconnected with its rail service, but, solely, to enable it to use the motor vehicle as an "auxiliary or adjunct to railroad service" in the rendition of a coordinated rail-motor service, "a new form of service". It was specifically indicated that "future healthy competition between rail and truck service" would not be fostered by giving "the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to their rail operations." When the vendee in its offer of compliance persisted in its proposal to conduct all-motor operations under the label of operations "supplemental" of rail service, the supplemental report declared the proposed operations to be

"broader than intended by the conditions" stated in the prior report and to remove all doubt declared that "approved operations are those which are auxiliary or supplemental to train service," and that they were "best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called "station-to-station" service. By way of contrast, it further listed non-approved motor operations in three specific categories: (1) those which otherwise compete with the railroad itself; (2) those which compete with an established motor carrier; and (3) those which invade to a substantial degree the territory already served by another rail carrier. There could be no non-approved operations of category (1) above, competing with the railroad itself, except *within* the territory served by the railroad. Unlimited operation within that territory was therefore definitely disapproved.

125 A railroad cannot compete with itself except in its own service-territory. Similarly non-approved operations of category (2) above, namely those which compete with an established motor carrier, were all-motor operations either within or without rail-service territory, for clearly the purpose of the approved rail-motor operations was to compete, even more effectively than could rail service only, with established motor carriers. Non-approved operations in both categories (1) and (2) would be meaningless if approved operations were not intended to be restricted except territorially.

In these circumstances and contrasting the language used and the supporting discussion with the much simpler language which would have been adequate if it had been intended to restrict future operations of the vendee only territorially, it is clear that any tendency to treat the *Barker case* as an approval of future rail-motor operations which should be unrestricted except territorially, ignores the clear declaration that certain types of operations are disapproved wherever conducted, and must spring from a misinterpretation of the intent of the reports therein.

The above construction of the reports in the *Barker case* is confirmed by the reports in the *Kansas City Southern case*, and others which followed it. It is inconceivable that the same language "auxiliary to, and supplemental of," should be used in scores of our reports for the purpose of limiting or defining motor carrier operating rights but with different meanings depending upon whether the operating

rights in question were acquired by an application under section 207 or by purchase. The original report in the *Kansas City Southern* case filed by the same division as had decided the *Barker* case, cites and discusses that case. Both this report and our report on reconsideration show a purpose, in the disposition of cases arising under section 207, to give weight to the same considerations and to impose the same special safeguards as had been applied in the *Barker* case. In these circumstances the lifting or borrowing of the language used in the *Barker* case to describe the approved service which might be given by the vendee under the acquired operating right, and the use of the same language, "auxiliary to and supplemental of," to define and limit the service which might be given under the authority granted in the *Kansas City Southern* case could not have been with any intent to use such words in the later case in any different sense than they had been used in the former case. This being true, the form and greater detail of the restrictions imposed in the *Kansas City Southern* case, where a general restriction against any service not auxiliary to, or supplemental of, train service was amplified by the addition of several subordinate but more specific restrictions, are significant as notice to everyone of the intent in the *Barker* case.

It is our opinion, originally indicated in the *Kansas City Southern* case and confirmed by nearly a decade of experience in motor carrier regulations, that the preservation of the inherent advantages of motor carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

127 We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does

not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. In other words a railroad applicant for authority to operate as a common carrier by motor vehicle though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negating any disadvantage to the public from this fact a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified.

In the light of the foregoing there remains for consideration the particular operations involved in the proceedings now before us.

*No. MC-2327.*—As above indicated the transaction proposed in this proceeding was approved by division 4 without restricting, and without specifically reserving the right later to restrict, the future operations of Transit to service auxiliary to, or supplemental of, the train service of the railroad. The proceeding was, however, reopened by us for reconsideration on the present record to determine

the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor carrier service performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and no certificate covering the operation in question has been issued to Transit.

The motor carrier operating right, authority for the purchase of which was sought by Transit in this proceeding, consists of a two-way operation between Omaha and Harlan, Iowa, over a route through Avoca and a one-way (counter-clockwise) loop operation from Avoca to Oakland to Atlantic, and thence back to Avoca. The route between Omaha and Avoca parallels the railroad's main line between Omaha, Des Moines, and Chicago. The Avoca-Harlan route parallels a branch line of the railroad between the same points. The Avoca-Atlantic one-way loop route

parallels a branch line of the railroad extending south from Avoca through Oakland to Carson. Eastward from Oakland to Atlantic it does not follow any rail line but does duplicate a short segment of the Omaha-Silvis route, authority for the purchase of which, subject to a specific reservation of a right later to impose conditions to insure performance only of auxiliary and supplementary service, was granted in the title case. The westbound Atlantic-to-Avoca segment of the loop route parallels the railroad's Omaha-Des Moines-Chicago main line and with the Omaha-Avoca segment gives Transit a through route westbound from Atlantic to Omaha paralleling the railroad's main line. Excluding the duplicating segment, these routes aggregate 81 miles of which 56 miles parallel the main line of the railroad and 25 a branch line.

As found in the prior report in this proceeding, Transit has shown that its acquisition of the routes would enable the railroad to use service by motor vehicle thereover to public advantage *in its railroad operations* but it has not shown any need for, or any circumstance which would  
 129 justify us in approving, its operation over such routes for the purpose of supplying an all-motor service competitive with other motor carriers and with the service of the railroad itself as distinguished from a service auxiliary to, or supplemental of, rail service. In the light of our foregoing discussion, it is clear that Transit's future operations as a common carrier by motor vehicle over the routes involved in this proceeding should be restricted in a manner to limit the service to that which is auxiliary to, or supplemental of, train service of the railroad. As disclosed by the prior report Transit is opposed to an immediately-prior-or immediately-subsequent-rail-haul restriction and it is clear that any such restriction is inappropriate here. The operating right involved in this proceeding will be made subject to restrictions patterned after those imposed in the report on oral argument and reconsideration in the *Kansas-City Southern case*, including an appropriate key-point restriction which will be discussed further herein in connection with the title case.

*No. MC-F-445.*—By reason of the acquisition approved in the original report in this proceeding, Transit is now authorized to operate as a common carrier by motor vehicle between Omaha and Silvis over a regular route subject, however, to conditions 2 and 5A as set forth in the appendix hereto.

We have reopened the proceeding to determine what conditions or restrictions, if any, should now be imposed to insure that Transit's service over such route should be limited to that which is auxiliary to, or supplemental of, rail service. In view of the aforementioned condition numbered 5A in the appendix there is no question of our authority at this time to impose such restrictions as now appear appropriate to the end indicated.

Transit's Omaha-Silvis route is 328 miles in length and, except for the 56-mile Omaha-Atlantic segment, follows closely the railroad's Omaha-Chicago main line passing through Des Moines and Davenport. The points on the route authorized to be served by Transit in sequence beginning at Silvis, and their populations, 1940 census, are: In Illinois—Silvis, 2,990; East Moline, 12,359; Moline, 34,608; and Rock Island, 42,775; in Iowa—Davenport, 66,039; Bettendorf, 3,143; Durant, not stated; Muscatine, 18,286; Wilton Junction, 1,146; Atalissa, not stated; Cedar Rapids, 62,120; Oxford, not stated; Homestead, 285; Marengo, 2,260; Lodora, not stated; Victor, 763; Brooklyn, 1,408; Grinnell, 5,210; Newton, 10,462; Colfax, 2,252; Mitchellville, 769; Altoona, 640; Des Moines, 159,819; Dexter, 760; Stuart, 1,611; Menlo, 441; Casey, 709; Adair, 874; Anita, 1,088; Wiota, not stated; Atlantic, 5,802; Oakland, 1,317; and Council Bluffs, 41,439; and in Nebraska—Omaha, 223,844. The points in Iowa authorized to be served by Transit under non-duplicating routes acquired pursuant to the authority granted in the *Frederickson case*, and their populations are: Marne, 245; Walnut, 902; Avoca, 1,598; Minden, 310; Neola, 841; Underwood, 251; Weston, 77; Shelby, 627; Harlan, 3,727; and Hancock, 256. All the foregoing points have other common-carrier service, either rail or motor, and the principal points have both types of service.

Omaha, the western terminus of the considered routes, is a large city and an important point on the railroad. Des Moines, located 140 miles east of Omaha and 188 miles west of Silvis, is also a large city and an important junction point of the railroad. Rock Island and Moline, in Illinois, and Davenport and Bettendorf, in Iowa, are practically adjacent, being separated by the Mississippi River. East Moline is contiguous to Moline. The aggregate population of those five points is approximately 160,000. All five points will be considered herein as a single area and referred to as the Tri-Cities.

As already indicated Transit in seeking authority for the purchase from White of the operating right

over this route stressed its desire to coordinate future motor operations with the railroad's train service for the purpose of improving the latter and agreed to abandon any right which White might have to serve non-rail points. Examination of the record shows that the plan of coordination was substantially identical with that subsequently considered by us in the *Kansas City Southern* case. There are no special circumstances dictating an exception to the application of the principles previously discussed, and we accordingly conclude that Transit's right to operate over the considered route should now be made subject to the conditions or limitations imposed in the latter case to insure that future operations under the motor carrier operating rights there involved should be limited to those auxiliary to, or supplemental of, train service. Although the subject of key points was not specifically dealt with in the present record it may be taken as certain that less-than-carload traffic from and to intermediate way-points is set out at or picked up by through freight trains at Omaha, Des Moines, and the Tri-Cities. These points will be designated as key points in connection with the operations involved in this proceeding and also those involved in No. MC-F-2327. The fact that neither Davenport nor Des Moines is located on the routes involved in the latter proceeding does not preclude the naming of them as key points in connection with operations over the routes. *Rock Island Motor Transport Extension—Trenton, Mo.*, 43 M. C. C. 470. Experience may demonstrate that additional or different key points should be designated in connection with these operations (as for example a key point beyond Omaha or Silyis) for the purpose of preventing unduly long all-motor hauls. If so necessary changes can be made, under the power reserved by condition 5, either on petition of any interested party or on our own motion.

132 Upon reconsideration we find that the certificate heretofore issued to The Rock Island Motor Transit Company in No. MC-29130, to the extent it embraces the motor common carrier operating rights acquired by the transaction authorized and approved in No. MC-F-445 should be modified so as to require that all future operations thereunder be conducted subject to the following conditions and restrictions:

1. The service to be performed by The Rock Island Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Railway.

2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on a rail line of the Railway.
3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Neb., Des Moines, Iowa, and collectively Davenport and Bettendorf and Rock Island, Moline, and East Moline, Ill.
4. All contractual arrangements between The Rock Island Motor Transit Company and the Railway shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.
5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

We further find that operation by The Rock Island Motor Transit Company under the certificate to be issued representing the operating rights acquired by the transaction authorized and approved in No. MC-F-2327 133 should also be made subject to the conditions and restrictions set forth in the preceding finding.

An appropriate order will be entered.

COMMISSIONERS ALLDREDGE and PATTEL ON concur in the result.

PORTER and MAHAFFEY, *Commissioners*, dissenting:

We concur in Commissioner Miller's separate expression, except the suggestion that authority, in the future, be limited to traffic which moves at rail rates and on rail billing. We do not agree with this because when there is a difference between motor carrier rates and rail rates, this limitation would tend to aggravate differences between those motor carriers which are subsidiaries of railroads and those which are not. In our opinion, limiting the service to rail points or points within a reasonable distance of those served by railroad, would be sufficient.

MILLER, *Commissioner*, dissenting:

Eight years ago we approved and authorized the purchase by Transit of operating rights of White Line, then claimed under the "grandfather" clause. In doing so, we found that Transit proposed to render, under the acquired rights, an all-truck service between points also served by

the trains of its parent railroad as well as a truck service coordinated with that train service. There is nothing in that report limiting the operating rights to be acquired to prevent such service being rendered. That transaction was consummated and a certificate was eventually issued to Transit covering the rights, also without restriction as to the kind of service authorized. For eight years Transit has rendered motor-carrier service under those rights, without question that it was rendering the lawfully authorized service. Without affording Transit an opportunity for hearing on the question, the majority now deprive Transit of its rights to continue to render the kind of service which it has been rendering by imposing restrictions like those imposed in *Kansas City Southern Transport Co. Inc., Common Carrier Application*, 10 M. C. C. 221, 28 M. C. C. 5, a proceeding arising under section 207 of the act, including a condition limiting the service authorized to that which is auxiliary to or supplemental of, train service of the parent railroad. The majority report leaves no doubt that this restriction is intended to deprive Transit of the right to engage in operations unconnected with the rail service, of the right to be a party to tariffs containing all-motor or joint rates, and of the right to transport freight at other than the rail rates of its parent. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943. The majority take similar action in respect of operating rights purchased by Transit from the Fredericksens pursuant to our approval, which was also granted without any condition being imposed limiting the kind of service authorized under the rights upon exercise of the purchase authority. The action of the majority, in my opinion, is arbitrary, is wholly unsupported by anything in these records, is without knowledge of the remaining available service, and is unfair to the carrier which invested its funds in these properties pursuant to our prior approval of its unrestricted operations under the rights acquired.

The justification given by the majority for the action taken is not convincing. The long quotations from the *Barker case* embrace a general discussion of the manner in which a motor-carrier subsidiary of a railroad may coordinate its operations with the train service. However, the only conditions imposed in that proceeding affecting service under the rights authorized to be acquired were the two which canceled so much of those rights as

135 authorized operations in territory outside the natural territory of the parent railroad. Those conditions had nothing to do with the *kind of service* to be rendered. That transaction was consummated, a certificate was issued to the vendee as successor under the "grandfather" clause, without any restriction whatsoever as to the kind of service authorized under the rights, and vendee presumably has conducted an unrestricted all-motor service as authorized by that certificate. Even in the discussion in those quotations from the *Barker case*, there is nothing to indicate that the view of auxiliary and supplementary service then held was of a service limited to the transportation of rail freight at rail rates. The phrase was not so specifically interpreted until six years later in the *Texas & Pacific case*. In not a single rail-motor acquisition case decided after the *Barker case* was any condition precedent to approval imposed which modified the acquired rights to prevent the rendition of all-motor service by the railroad subsidiary until the report of the Commission, Division 4, in *Southern Pac. Transport Co.—Pur.—Trinity M. Frt. Lines*, 40 M. C. C. 215, decided June 13, 1945, where, under the facts there existing, a condition precedent was imposed, modifying the rights to limit the service authorized solely to that which was auxiliary to or supplemental of train service within the meaning of the *Texas & Pacific case*. Indeed, on two occasions after the decision in the *Kansas City Southern case*, on petitions for reconsideration by protestants in rail-motor acquisition cases, based on the contention that the rights acquired should be restricted in a manner similar to the restrictions in the *Kansas City Southern case*, the Commission denied the petition, thus affirming the action of Division 4 in refusing to restrict the rights in that way. *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, and *Southwestern Transp. Co.—Purchase—Hill and Howe*, 37 M. C. C. 83.

136 The majority correctly point out that, from the date of the decision in the *Barker case* the principles there recognized and applied controlled the disposition of every rail-motor acquisition case. The point is, however, that neither in the *Barker case* nor those which followed it was any condition to approval imposed which cancelled any of the acquired operating rights so far as the *kind of service* authorized was concerned. Contrary to the view of the majority that the report in *Frisco Transp. Co.—Purchase—Reddish, supra*, marked a departure from former policy, evidenced by the *Barker case*, that report is wholly in line

with the report in the *Barker case*. In both cases the only conditions imposed with respect to the rights were geographical. The majority state:

Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker case*, were limited only territorially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied.

The carriers and the public generally should not be forced to read into our reports intentions which are not clearly stated therein, or to anticipate that, years after we have given our approval without stating what we mean, we then, on our own motion, and without a hearing, cancel certain of the rights previously authorized to be acquired—on the ground that such was our intention when we first granted the authority. This applies equally to those cases wherein a condition was imposed reserving the power to impose future conditions as well as those where no such power was reserved. That condition, when used, referred vaguely to imposition of future restrictions to limit the service to that which was "auxiliary to, or supplemental of", train

137 service. At the time that condition was imposed the carriers had no reason to anticipate, from anything stated in the reports, that such power might, at some distant future date, take the form of depriving it of the right to haul all traffic except that of the parent railroad, should they exercise the authority granted. Particularly is this true when, even after the decision in the *Kansas City Southern case*, the Commission continued to refrain in every case from imposing conditions in acquisition cases limiting the kind of service in any way under the acquired rights. "Auxiliary and supplemental" had never been stated, in any acquisition case, to mean a service limited to that of transporting freight of and for the parent railroad, until the single recent case above cited.

We have permitted these carriers to invest their funds in acquiring definite operating rights, unrestricted as to the kind of service authorized. The "transactions", approved under section 213 or section 5, have been consummated and there is here no longer any question of the transactions being "consistent with the public interest" or that they would "enable such carrier to use service by motor vehicle to public advantage in its operations". These issues were fully determined in the prior reports when the

applications were granted. Those findings were made on the basis of rendition of all motor service as well as a co-ordinated service. The majority now cancel certain of the rights permitted to be acquired under those findings. No attempt is made, in taking this action, to meet the requirements of section 212(a).

It is my view that, for the future, motor-carrier subsidiaries of railroads should not be permitted, in section 5 proceedings, to acquire and to engage in unrestricted all-motor operations unconnected with the train service of their parent railroad. It is entirely proper and, I believe, necessary in the public interest, that when we permit railroads to acquire control of motor-carrier operations under section 5, appropriate conditions precedent to the exercise of the authority should ordinarily be imposed modifying the operating rights and the kind of service authorized under the rights in such a way as to prevent the motor-carrier subsidiary from engaging in all-truck service competitive with independent motor carriers. It seems to me that the imposition of a condition precedent which would require the motor-carrier subsidiary to engage only in the transportation of freight from or to stations on the line of the parent railroad, at rail rates and on rail billing, generally would suffice for this purpose. No such condition was imposed in these proceedings and we should not now, long after exercise of the authority previously granted, arbitrarily cancel certain of the operating rights permitted to be acquired, on the theory that we intended to do it at the time we approved the transactions.

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## APPENDIX.

Docket No.	Points	Conditions.
MC-F-445 5 M. C. C. 451 15 M. C. C. 753	Omaha-Silvis, Ill. Off route points: Cedar Rapids, Muscatine, Bettendorf, and Oxford, Ia.	2 and 5-A
MC-29130 No report.		
MC-29130 (Sub-No. 1) 33 M. C. C. 349 42 M. C. C. 359	Des Moines-Eldon Muscatine-Eldon	1, 2, 3-A, 4, and 5
MC-29130 (Sub-No. 2) 33 M. C. C. 349	Silvis-Chicago	1, 2, 4, and 5
MC-29130 (Sub-No. 9) 29 M. C. C. 695	Iowa City-Wellman	None. Unrestricted service proposed and

Docket No.	Points	Conditions
-29130 (Sub-No. 26) 2 M. C. C. 856	Guthrie Center Branch Alternate Route Entry into Des Moines	1, 2, 4, and 5
-F-1305 6 M. C. C. 469	Clinton-Davenport-Muscatine	None
-F-1327 6 M. C. C. 469	Audubon Branch Omaha-Griswold	None
-F-701 5 M. C. C. 87	Des Moines-Kansas City No service at intermediate points in Iowa except Indianola	2 and 5-A
-29130 (Sub-No. 14) No report.		
-F-468 5 M. C. C. 629	Des Moines-Minneapolis	5-A
-29130 (Sub. No. 16) 9 M. C. C. 841	Des Moines-Colo., Ia. Alternate for part of preceding route already restricted	None specifically but 5-A indirectly
-F-1928 9 M. C. C. 20	Omaha-Lincoln and West	2
-F-2327 9 M. C. C. 824	Omaha-Harlan Avoca <sup>2</sup> Atlantic—one way loop route.	None

#### 140 CONDITIONS.

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the rail service of the railroad.
2. Rock Island Motor Transit Company shall not render service from or to, or interchange traffic at, any point other than a station on the lines of the railroad.
3. Shipments transported by applicant shall be limited to those which it receives from or delivers to the railway under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.
- 3-A. No shipments shall be transported by applicant between any of the following points, or through or to or from more than one of said points: LaSalle, Peoria, and Rock Island, Ill., and Des Moines, Ottumwa, and Muscatine, Iowa. (Des Moines, Ottumwa and Muscatine were later eliminated as key points. 42 M. C. C. 359.)
4. All contractual arrangements between applicant and the railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation by motor vehicle to service which is auxiliary to, or supplemental of, the rail service of the railroad.
- 5 A. The authority herein granted shall be subject to such further limitations, restrictions, or modifications as the Commission may find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition.

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## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March, A. D. 1946.

No. MC-F-445.

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED,  
ET AL.

No. MC-F-2327.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON.

No. MC-29130.

(Formerly No. MC-49147.)

THE ROCK ISLAND MOTOR TRANSIT CO., COMMON  
CARRIER APPLICATION.

*It appearing*, That by reports, 5 M. C. C. 451, and 15 M. C. C. 763, and orders of April 1, 1938, and April 17, 1939, in No. MC-F-445, and by a report, 39 M. C. C. 824, and order of November 28, 1944, in No. MC-F-2327,  
142 the Commission, divisions 5 and 4, respectively authorized The Rock Island Motor Transit Company to acquire by purchases, which have been consummated, certain operating rights as a common carrier by motor vehicle;

*It further appearing*, That by an order of February 5, 1945, the above-entitled proceedings were reopened for reconsideration on the present records solely to determine the conditions or restrictions, if any, which should be im-

posed to insure that the motor carrier service performed by The Rock Island Motor Transit Company pursuant to authority so acquired should be limited to service which is auxiliary to, or supplemental of rail service;

*And it further appearing,* That such reconsideration has been given and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the prior reports and orders of April 1, 1938, April 17, 1939, and November 28, 1944, in these proceedings are hereby referred to and made a part hereof:

*It is ordered,* That the certificate heretofore issued in No. MC-29130, to the extent it embraces the operating rights acquired by the transaction approved and authorized in No. MC-F-445, shall be modified, and that the certificate to be issued representing the operating rights acquired by the transaction approved and authorized in No. MC-F-2327 shall be framed, so as to make the motor common carrier operations authorized thereby subject to the conditions and restrictions set forth in the findings of the said report on reconsideration.

By the Commission.

W. P. BARTEL,  
*Secretary.*

(SEAL)

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*Exhibit 9*

REPORT AND ORDER OF COMMISSION DENYING PETITION FOR RECONSIDERATION AND CONFIRMING ORDER OF MARCH 4, 1946 IMPOSING RESTRICTIONS EFFECTIVE MAY 31, 1949 (EXTENDED TO JUNE 30, 1949), ISSUED APRIL 11, 1949.

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INTERSTATE COMMERCE COMMISSION

No. MC-F-445<sup>1</sup>.

THE ROCK ISLAND MOTOR TRANSIT—PURCHASE—WHITE LINE  
MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

Submitted October 9, 1947.

Decided April 11, 1949.

On further hearing, findings in prior report on reconsideration 40 M. C. C. 457, affirmed. The certificate issued in

<sup>1</sup>This report also embraces No. MC-F-2327. The Chicago Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, and No. MC-29130 (formerly No.

No. MC-29130, insofar as it embraced motor common carrier operating rights acquired by the transaction authorized in No. MC-F-445, ordered modified, and certificate to be issued covering motor common carrier operating rights acquired pursuant to authority granted in No. MC-F-2327 (prior report 39 M. C. C. 824) ordered framed in such a manner as to subject the motor common carrier operations thereunder to stated restrictions calculated to insure that the motor service given in the future shall be limited to that which is auxiliary to, or supplemental of train service. Other prior reports 5 M. C. C. 451, and 15 M. C. C. 763.

Appearances as shown in prior reports, and in addition: *David Axelrod*, *Franklin R. Overmyer*, and *Jack Garret Scoti* for interveners.

#### 146. REPORT OF THE COMMISSION ON FURTHER HEARING.

##### BY THE COMMISSION :

In the first report in the title case, 5 M. C. C. 451, decided April 1, 1938, division 5 granted authority under former section 213 of the Motor Carrier Act, 1935, for the purchase by The Rock Island Motor Transit Company, a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railway Company<sup>2</sup>, herein called Transit, of certain claimed "grandfather" motor carrier operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, herein collectively called White Lines. Approval of the purchase was made subject to two conditions, among others not now important, as follows: (a) that Transit should not serve, or interchange traffic at, any point not a station on the railroad; and (b) that the authority granted should be subject to such further

<sup>2</sup> Prior to January 1, 1948, the capital stock of Transit was held by Joseph B. Fleming and Aaron Colnon, as trustees for The Chicago, Rock Island and Pacific Railway Company. For the purpose of consummating a plan of reorganization approved in Finance Docket No. 10028, and confirmed by the District Court of the United States for the Northern District of Illinois, Eastern Division, and pursuant to authority granted in a report in that proceeding, *Chicago, Rock Island and Pacific Railway Company*, Reorganization 267 I. C. C. 867 (decided December 23, 1947) the trusteeship was terminated December 31, 1947, and the properties of the debtor, including the stock of Transit, were transferred to the Chicago, Rock Island and Pacific Railroad Company, a Delaware corporation formed December 16, 1947, effective January 1, 1948. Reference in this report to the railroad will mean either the trusteeship or the new corporation, depending upon the period involved.

limitations, restrictions, or modifications as might later be found necessary to insure that the future motor service of Transit should be auxiliary or supplementary to train service of the railroad and should not unduly restrain competition.

Transit consummated the authorized transaction, 147 filed tariffs with us, and took over the operations in

April 1938. Subsequently, a certificate was issued to it covering only that portion of the claimed rights between Silvis and Omaha. A "grandfather" right to a certificate covering the remainder of the claimed rights was denied. The certificate issued authorized service at all intermediate points on the authorized routes which are stations on the railroad and at the ~~off-route~~ points of Cedar Rapids, Muscatine, Bettendorf, and Oxford, Iowa, which points are also stations on the railroad. It did not contain any restriction on the kind of service authorized, but did specifically provide that it was subject to the condition of reserved right of the Commission later to impose such restrictions which might be found necessary to insure that the service should be limited to that which is auxiliary to or supplemental of train service of the railroad and should not unduly restrain competition. Although not particularly significant here, it may be observed that, subsequently, in No. MC-29130 (Sub-No. 2), *Rock Island Motor Transit Co. Extension—Elletts, Iowa*, 33 M. C. C. 349, a certificate was granted to Transit under section 207 authorizing operation as a motor common carrier of general commodities, with certain exceptions, between Chicago and Silvis, serving no intermediate points, and subject to several restrictions, including one limiting the authorized service to that which is auxiliary to, or supplemental of, rail service.

In No. MC-F-2327, *The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson*, 39 M. C. C. 824, decided November 28, 1944, division 4 authorized Transit to purchase certain operating rights between Atlantic, Iowa, and Omaha over a route through Avoca and Neola, Iowa, between Harlan and Oakland, Iowa, over a route through Avoca, and between Atlantic and Oakland, serving specified intermediate and off-route 148 points, all of which are stations on the railroad.

In authorizing that transaction, division 4 imposed no restriction on the kind of service which Transit could render under the rights to be acquired, nor did it

impose any condition reserving the power to impose restrictions in the future. The transaction authorized was consummated January 22, 1945, but as yet, no certificate covering the rights purchase has been issued. Instead by an order of February 5, 1945, on our own motion, we reopened that proceeding and No. MC-F-445<sup>a</sup>, for reconsideration on the then existing records, to determine:

(a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor carrier service performed by The Rock Island Motor Transit Company is limited to that which is auxiliary to, or supplemental of, rail service, and

(b) the condition, if any appears necessary, which should be imposed so as to make the authority granted to the Rock Island Motor Transit Company subject to such further conditions or restrictions as the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service.

By an order entered March 15, 1945, the Regular Common Carrier Conference of the American Trucking Association, Inc., was permitted to intervene in the proceedings; and in a report on reconsideration, 40 M. C. C. 457, we found that our reserved power to impose restrictions on the certificate which had been issued to Transit in No. MC-29130, covering the operating rights acquired by the transaction approved in No. MC-F-445, should be exercised, and that the certificate should be framed in such a manner as to make future operations thereunder subject to the following conditions and restrictions:

1. The service to be performed by the Rock Island  
149 Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Railway.

2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on a rail line of the Railway.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa,

<sup>a</sup> This order also covered No. MC-29130, which was the number assigned to the operating rights purchased by Transit pursuant to authority granted in No. MC-F-445.

and collectively Davenport and Bettendorf and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between The Rock Island Motor Transit Company and the Railway shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

We also found therein that the certificate which yet remained to be issued to Transit, covering the operating rights acquired by the transaction approved in No. MC-F-2327, should be made subject to the same conditions and restrictions.

Following this report, Transit filed a petition seeking reconsideration, oral argument, and withdrawal of the described report on reconsideration, to which petition The Regular Common Carrier Conference replied. The petition was prefaced by a statement that Transit was entering a special appearance only for the sole purpose of filing the petition and was "specifically preserving the point of law that the Commission is without jurisdiction to change or modify the orders authorizing acquisition of petitioner's certificate". The petition contended generally that the order accompanying our prior report on reconsideration is void for reasons which will be discussed more fully later herein. It did not seek a further hearing, but consideration of it suggested the desirability of such a hearing, and by an order entered June 9 the two proceedings (No. MC-29130, as above indicated is but the continuance of F-445) were reopened for further hearing for the declared purpose of determining—

what conditions, if any appears necessary and proper, should be imposed to limit the service of [Transit], under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451), and November 28, 1944 (39 M. C. C. 824) in Nos. MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to, or supplemental of, the rail service of The Chicago, Rock Island and Pacific Railway Company.

Prior to the further hearing, Transit filed a motion to vacate or rescind the order reopening the proceedings, declaring that our action was in error to the extent it pur-

ported to be based upon any request on its part for a further hearing, and pointing out that in its petition it had denied our power and authority to impose any conditions or restrictions whatsoever not contained in the original authorizations under which the operations in question had been acquired, and that it had sought in its petition reconsideration and oral argument only on the question of withdrawal of the prior report and order on reconsideration. This motion was overruled by order entered October 6, 1947, and a further hearing was held in both proceedings on a consolidated record on October 9, 1947.

Transit entered a special appearance at that hearing solely to contest our jurisdiction in assigning the proceedings for further hearing for the purpose indicated. It

presented no witnesses and offered no evidence to  
151 show factually a lack of necessity or justification for the imposition of the conditions prescribed in our report on reconsideration or for other conditions in lieu thereof. It did, however, offer an affidavit by its general manager in support of its motion, described above, apparently being unaware at the time that the motion had been overruled. The affidavit reiterates only the arguments already made in the petition which will be discussed in detail and it requires no further consideration here.

The Regular Common Carrier Conference and several motor carriers appeared at the further hearing as interveners, but offered no evidence. One of them, Dohrn Transfer Company, moved to incorporate by reference as part of the record herein the record made on a complaint filed by its against Transit in No. MC-C-406, which complaint alleged that Transit was engaged in unauthorized operations between Peoria, Ill., and Davenport, Iowa, in rendering service not auxiliary to, or supplemental of, the rail service of its proprietary railroad.\* Rule 82 of

\* In that proceeding, *Dohrn Transfer Co. v. Rock Island Motor Transit Co.*, 47 M. C. C. 791, division 5 found that Transit was engaged in the unauthorized operations as alleged and ordered it to cease and desist therefrom. The route involved was in part between Moline, Ill., and Davenport and was covered by certificate No. MC-29130. The balance of the route, between Peoria and Moline, was embraced in certificate No. MC-29130 (Sub-No. 7) and contained conditions restricting the operations to service auxiliary to, or supplemental of, the service of the railroad. The division found that the conditions attached to the latter segment necessarily limited operations conducted in part of such restricted segment.

our General Rules of Practice provides that if any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless, among other things, the parties stipulate upon the record that such portion may be incorporated by reference. Since no such stipulation is shown, intervenor's motion to incorporate by reference the record in question is overruled.

152 No new or additional evidence having been received as a result of the further hearing, the only issue now before us is the question whether the reasoning of our prior report on reconsideration and the conclusions there reached are sound in the face of the criticisms thereof contained in Transit's petition. We shall not burden this report with a complete repetition of the discussion in the prior report. We have, however, carefully reviewed that report and find no occasion to revise materially anything that was said there. Our discussion therein of the fundamental issues presented is accordingly reaffirmed and reference is made to it for the fundamentals of the issues presented. So far as practicable we shall limit our present discussion to a consideration of the various arguments advanced by Transit's petition in opposition to the reasoning and conclusions heretofore reached.

Some reference to the prior report is, however, necessary by way of background. There we set forth our views as to the Congressional intent with respect to the participation by railroads and their affiliates in motor-carrier transportation. After quoting the initial Congressional declaration of policy as contained in section 202(a) of the Motor Carrier Act, 1935, now part II of the Interstate Commerce Act, we said, beginning at page 461:

Consistently with, and obviously in furtherance of, this policy, it was specifically provided by section 213 that no "carrier other than a motor carrier" nor any person controlled by, or affiliated with, any "carrier other than a motor carrier" should be authorized to consolidate or merge with, purchase, lease, operate under contract, or otherwise acquire control of, any motor carrier unless this Commission should first find not only that the transaction would be consistent with the public interest but further that it would "promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle

to public advantage in its operations" and would not unduly restrain competition.

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By these provisions of the law the Congress indisputably intended not only to provide for the impartial regulation of *all* of the indicated modes of transportation but also affirmatively to foster, promote and preserve the inherent advantages of each mode of transportation. As an essential element of the latter purpose provision was specifically made to protect each mode of transportation from the suppression or strangulation thereof which might follow if control thereof were allowed to fall into the hands of a competing transportation agency. At the same time it was recognized that motor vehicles legitimately and properly could be used as a subordinate instrumentality for the improvement of non-motor-carrier transportation services. In order to allow such use in the public interest, the way was left open for carriers other than motor-carriers, with this Commission's approval, to acquire control of motor carriers, but it was provided that such acquisition should not be sanctioned unless it first be found that the "transaction proposed would *promote* the public interest", and that, in a particular way, namely, "by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its [non-motor-carrier] operations" and would not unduly restrain competition.

After nearly 5 years of regulation under the Motor Carrier Act, 1935, in the course of which section 213 was construed and applied and during which effect was given in proceedings under section 207 of the act to the declared policy of the Congress as confirmed and furthered by section 213, the Transportation Act, 1940, was enacted. Therein the previously declared policy of the Congress was broadened somewhat to cover all modes of transportation and restated as the national transportation policy. At the same time section 213 was revised slightly and consolidated with section 5 of Part I of the act.

In view of the intervening administrative construction and application of the declared policy of the Congress and of section 213 it is particularly significant  
154 that both the new declaration of policy and the revised section 5 were so framed as to confirm and ap-

prove, rather than disapprove, the manner in which those portions of the act had theretofore been construed and applied by us. Specifically the Transportation Act, 1940, declared it to be the national transportation policy impartially to regulate "all modes of transportation" so as "to recognize and preserve the inherent advantage of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment of reasonable charges . . . without . . . unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail . . . ." Section 5 as amended to include former section 213, again provided that an acquisition of a motor carrier by a railroad or by any person controlled by, or affiliated with a railroad, should not be approved except after a finding "that the transaction proposed will be consistent with the public interest and will enable such rail carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

After discussing the leading cases in which the above policy has been administratively construed and applied, we stated—

It is our opinion, originally indicating the *Kansas City Southern* case<sup>5</sup> and confirmed by nearly a decade of experience in motor-carrier regulations, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation [industry] and among the several carriers, in short the accomplishment of the purposes  
 155 forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the

<sup>5</sup> *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M. C. C. 221, 28 M. C. C. 5.

future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

We concluded that there could be no question of our authority to impose the restrictions above set forth on Transit's operations acquired in No. MC-F-445, in view of the fact that we had specifically reserved the right to do so in granting the authority to purchase and in the certificate itself. And, since no certificate has been issued to Transit covering the acquisition in No. MC-F-2327, we found no legal obstacle to a reopening of that proceeding for the purpose of imposing such conditions.

In its petition, however, Transit contends that the order accompanying our prior report herein is void: because it exceeds our jurisdiction; because it restricts certificates and operating rights established by the "grandfather" clause of the act; because it is contrary to the provisions of section 212(a)<sup>6</sup> of the act in that it partially revokes or cancels vested operating rights in a manner other than that provided in that section and in disregard of *Campbell Sixty Six Exp. Inc. v. Frisco Transp. Co.*, 46 M. C. C. 223, and *United States v. Seatrail Lines*, 329 U. S. 424; because it violates the 5th amendment of the Constitution by depriving Transit of a property right without due process of law in that it substantially deprives it of the value of the operating rights; because it exceeds our power to impose conditions in acquisition cases; because it deprives Transit of the right to enter into joint rates with other motor carriers, and requires it to enter into such rates with a railroad, both in contravention of its statutory rights under section 216 (c) of the act; and because it is arbitrary, discriminatory against motor carrier subsidiaries of railroads, not based upon the evidence, and unreasonable, unjust and contrary to the law.

Further in support of its petition Transit declares that it made its position clear at the time its application to pur-

<sup>6</sup>Section 212(a) provides that certificates shall remain in effect until suspended or terminated as provided in that section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, \* \* \*". It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

chase the White Lines' operating rights was pending, namely, that it would consummate the transaction only if it were permitted to continue the all-motor common-carrier functions of the vendor, in addition to rendering a substituted and coordinated service for its proprietary railroad; that it met the special burden placed on rail applicants by section 213 (now incorporated in section 5), of the act; that in its exceptions to the order recommended by the examiner in No. MC-F-445, it stated that it would not consummate the transaction if a restriction recommended by the examiner prohibiting the performance of truck service at other than rail rates were retained; that division 5 in its report in No. MC-F-445, of April 1, 1938, approving the White Lines purchase recognized the validity of its objection to this recommended restriction by omitting it from its findings; and that the transaction was consummated in reliance upon the removal of this restriction. This omission is construed as an interpretation on the part of the division itself that the phrase "auxiliary to, or supplemental of, rail service" did not connote a rate restriction or prohibition against the conduct of all-motor operations at other than rail rates, but on the contrary,

157 is merely a geographical limitation preventing the rendition of all-motor service to and from other than rail points. It considers as supporting this view, the fact that before it commenced the operations it was directed by our Section of Tariffs to comply with section 217 of the act relating to the filing of motor-carrier tariffs by adoption of the motor-carrier tariffs of its vendors. It asserts that both the parties and this Commission, in reports which will be discussed later herein, have placed a practical interpretation on the phrase "auxiliary and supplementary" which prevailed during years of operation and until our report on reconsideration herein; that such report reads a new meaning into its certificate through a "tortured construction" of the report in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, 5 M. C. C. 9, and 49, hereinafter referred to as the *Barker case*; that the correct construction of the latter report and those which followed it is set forth in *Pacific M. Trucking Co., Purchase—Valley M. Lines, Inc.*, 39 M. C. C. 441; that if the operations are restricted as proposed it would be unable to qualify as a common carrier and unable to deal directly with the public, originate traffic, or interchange with other motor common carriers; that it would be removed

entirely from the motor-carrier field and relegated to the status of a mere instrumentality or adjunct of its proprietary railroad; that rates are not a proper factor to be considered in the disposition of certificate proceedings; and that to prohibit it from establishing joint rates with other motor carriers would be unlawful and in contravention of section 216(c) of the act. Finally our power in any finance proceeding to alter operations previously found to be required by public convenience and necessity or vested by virtue of "grandfather" rights is questioned.

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## DISCUSSION AND CONCLUSIONS

We shall discuss the two proceedings separately in the interest of clarity and because the principal issues raised with respect to each are not identical. We may point out at the outset, however, that no discussion is required with respect to Transit's contention that the conditions prescribed in our prior report will prevent it from qualifying as a common carrier by motor vehicle and establishing joint rates with other motor-common carriers. We considered at length and rejected similar arguments in *Rock Island Motor Transit Co., Ext.—Omaha and Belleville*, 46 M. C. C. 362. See also *Pacific Motor Trucking Co., Common Carrier Application*, 34 M. C. C. 249, 253. Its contention that rates are not a factor to be considered in these proceedings is correct, and our discussion of a similar contention in the first of the cases just cited makes further comment thereon unnecessary. Neither is there any merit, requiring discussion, in its contention that we have no power in a finance proceeding to impose conditions which alter operations previously found to be required by public convenience and necessity, or authorized under the "grandfather" clauses of the act. *Fabwell v. United States*, 69 F. Supp. 71, affirmed *per curiam* by the Supreme Court, .... U. S. ...., 91 L. Ed. 921.

No. MC-F-445.

Discussion of this proceeding will be simplified if Transit's numerous arguments are restated and rearranged somewhat. Omitting the points dismissed immediately above as not requiring further discussion, it is said: (1) That division 5's approval in the original report, of the purchase of the White Lines' operating rights was not coupled with any requirement or clearly indicated intention that future operations should exclude all-motor operations not aux-

159      iliary to or supplemental of rail service; (2) that it was mislead into consummating a transaction and making expenditures it would not otherwise have made to such an extent that it should not in fairness now be required to observe limitations it did not understand or intend to accept; (3) that our concept of what constitutes "auxiliary and supplemental" service has undergone a change since issuance of the original report in this case; (4) that our original concept of the meaning of the words "auxiliary and supplemental" contemplated a geographic limitation only; (5) that by a "tortured construction" of these words as originally used we now are seeking to hold it to standards or practices not originally stated or clearly indicated, contrary to the equities of the situation; (6) that any attempt now to impose the restrictions set forth in our prior report on reconsideration (construing them as we do) would, in any event, be in excess of our authority and contrary to law because it would amount to a taking of property without due process and because it would amount to a partial revocation of its certificate in disregard of section 212 of the act; (7) that, if otherwise within our power, the imposition now of such restrictions would be arbitrary, unsupported by any evidence, and discriminatory generally against motor carrier affiliates of railroads. Each of these points will be discussed either separately or in groups.

*Intent of original report; construction past and present or "auxiliary and supplemental"; and notice to Transit.* This proceeding was initiated by an application filed October 13, 1937, under section 213 (now section 5) of the act in which Transit sought authority to purchase certain "grandfather" operating rights of White Lines. Following a hearing, an examiner's report, referred to in Transit's petition, was served February 12, 1938, recommending approval of the purchase subject to several conditions, two of which are pertinent here. One of these two provided (a) that

160      Transit should not render service from or to, or interchange traffic at, any point not a station on the lines of its proprietary railroad, and (b) that the authority granted should "be subject to such further limitations as it may hereafter be further (found) necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service" of its proprietary railroad, and shall not unduly restrain competition. The other proposed condition provided that no truck service should be performed by Transit at other than rail rates. Transit filed exceptions to the proposed impositions.

sition of the second restriction, asserting that if it were required to perform the service at rail rates only it would be prevented from rendering an all-motor service; that there would be a resulting impairment of the value of the physical properties and operating rights involved; and that it would "abandon this transaction" if this condition were retained. It made no objection to the imposition of the condition reserving to the Commission the right in the future to impose restrictions necessary to insure that the service should be auxiliary or supplementary to train service. Division 5 approved the purchase April 1, 1938,<sup>7</sup> stating:

In an effort to retrieve some of the substantial volume of less-than-carload freight diverted from the railroad to competing highway carriers and to improve the railroad's service to the public, applicant proposes to utilize the operating rights of White Lines between Omaha and Chicago in the conduct of three distinct types of service, (1) a coordinated rail-truck service, to be auxiliary to existing all-rail service by moving merchandise cars to certain concentration or set-out points, and then making distribution by truck; (2) an all-truck service on short hauls between stations, where feasible and economical, as a substitute for rail service; and (3) an all-truck service restricted to points on the railroad, but in addition to rather than a substitute for rail service.

- 161 Considerable testimony was offered showing in detail the manner in which it is proposed to effect correlation of truck-and-rail service over the routes described, and many resulting advantages were recited. The general plan is similar in character to that outlined in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, and 5 M. C. C. 9 and 49, \* \* \* and leads to the same conclusions reached in that case, namely: "The motor vehicle can undoubtedly be used as a very valuable auxiliary or adjunct to railroad service, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such coordination of rail and motor-vehicle operations should be encouraged. The result will be a new form of service which should prove of much public advantage. Nor do we

<sup>7</sup> A supplemental report dated April 17, 1939, 15 M. C. C. 263, dealt with Transit's compliance with a condition not pertinent here.

believe that the creation of this new form of service will "unduly restrain competition." On the contrary, it should have the opposite effect.

We conditioned our authorization in the *Barker case* to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad, and in general indicated the scope of approved and disapproved operations. Many of the operating rights which would accrue to applicant under the instant transaction, if no conditions were imposed, are of a character of which we disapproved in the case cited. Applicant concedes this fact and, as heretofore stated, is agreeable to abandonment of all rights except common-carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids, and the "grandfather" applications of White Lines will be considered as amended accordingly.

The division approved the acquisition upon the specific finding that it

will promote the public interest by enabling the *Chicago, Rock Island and Pacific Railway Company* . . . to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition . . . (Emphasis added.)

162 While it omitted the proposed restriction specifically requiring that the operations be conducted at rail rates only, its approval followed repeated references to the *Barker case* and a discussion of approved and disapproved operations. Moreover it was made subject to two conditions of similar import. One of them provided that Transit should not "render service from or to, or interchange traffic at any point other than a station on the lines of" its proprietary railroad; and the other objected the authority granted "to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplementary to main service" and "shall not unduly restrain competition."

As stated, Transit consummated the transaction, filed the necessary tariffs, and instituted operations under the acquired rights on or about April 5, 1938. Later certificate No. MC-29130 was issued to it authorizing, as above stated the transportation of general commodities, with exceptions, between Siltis, Ill., and Omaha, Nebr., over a regular route.

The certificate specifically contains the condition imposed in the division's report approving the purchase, that:

The operations authorized \* \* \* are subject to such limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplementary to the train service of The Chicago, Rock Island and Pacific Railway Company and shall not unduly restrain competition.

As indicated, in our prior report, the *Barker case* was the first important proceeding requiring an interpretation and application of the Congressional intent with respect to the acquisition by a railroad or railroad affiliate of control of a motor carrier. Division 5's report in that case was rendered October 8, 1936, and antedated by 163 about 17 months its approval, in the original report in this case, of the purchase by Transit. In this original report, the division referred repeatedly to the *Barker case*, quoted from it, and discussed approved and disapproved operations based on it. That the approval of the purchase was predicated upon, and found its justification, in the principles announced in the *Barker case* is clear. Beyond question, Transit was authorized to purchase the White Lines' rights only in order that it might perform operations similar in character to those described in the earlier reports of division 5 in the *Barker case*. This being true it is appropriate to examine the reports in that case with a view to determining just what operations it contemplated should be performed by the acquiring railroad. In the first report therein, Division 5, stated:

Section 213 of the Motor Carrier Act, 1935, provides with respect to consolidations, mergers, and acquisitions of control that if the applicant be a carrier other than a motor carrier (*c. g.* a railroad), or a company controlled by or affiliated with such a carrier other than a motor carrier, we shall not give our approval unless we find "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." In other circumstances it is only necessary, under section 213, to find that the transaction proposed "will be consistent with the public interest." It is the obvious intent of the act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in

other forms of transportation, and no doubt railroads were particularly in mind. The proof in such cases must show, not merely that what is proposed is *consistent* with the public interest, but that it will actively *promote* the public interest and in a particular manner, namely, by enabling the acquiring carrier "to use service by motor vehicle to public advantage in its 164 operations". The proof must further show that the acquisition will not "unduly restrain competition."

\* . . . \*

The proof is convincing that over some of the routes in question the railroad can "use service by motor vehicle to public advantage in its operations." *The motor vehicle can undoubtedly be used as a very valuable auxiliary or adjunct to railroad service, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such coordination of rail and motor-vehicle operations should be encouraged. The result will be a new form of service which should prove of much public advantage. Nor do we believe that the creation of this new form of service will "unduly restrain competition." On the contrary, it should have the opposite effect.*

The railroad does not, however, so far as the routes in question are concerned, propose to confine itself to motor-vehicle service auxiliary to its rail operations. It contemplates also the furnishing of motor-carrier service which would not be associated in this way with rail operations, pointing out that with its financial and other resources it would be able to expand and improve very materially the service which the partnership has been furnishing. As evidence that this would not "unduly restrain competition", it further points, as we have seen, to the large number of competing motor carriers now operating in the same territory.

While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, *we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the*

165 *railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.*

*We are unable to find, therefore, that the employment by the railroad of the properties and rights of the partnership to provide over-highway truck service as proposed herein in competition with rail and motor carriers generally, including the railroad, will "promote the public interest" by enabling the railroad to "use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."* [Emphasis added.]

Approval of the acquisition was withheld pending acceptance by the railroad of certain conditions including: (1) a condition that the motor service to be rendered under the acquired authority would be confined "to service auxiliary and supplementary to that performed by" the railroad in its rail operations and in territory parrallel and adjacent to its rail lines, (2) a condition requiring submission of a statement of the routes and a description of the territory over, and within which, such auxiliary and supplementary service would be established and performed, and (3) a requirement with respect to divestment of all of the acquired rights which were not to be used in the performance of service auxiliary to or supplementary of train service. These conditions were accepted, but the statement

166 *in respect of the routes to be operated was not satisfactory and the division in a supplemental report dated March 6, 1937, 5 M. C. C. 9, restated the intent of the original report as follows (emphasis added):*

The scope of the operations proposed to be retained is broader than intended by the conditions we stated in our prior report. Hence, it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions. *Approved operations are those, which are auxiliary or supplementary to train service.* Except as hereinafter indicated, *nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.*

*Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called "station-to-station" service.* In that connection the shortest distance between two rail terminals, in terms of available travel routes, is sometimes by rail and other times by highway. Alternate highway routes of varying degrees of circuitry also usually exist, and, of the latter, that one which most closely parallels the interested rail line ordinarily will be regarded as most appropriate for auxiliary rail service, but this may not always be true. Sometimes the round-about character of a rail line is such that use in rail auxiliary service of a non-parallel shortcut highway is clearly in the public interest, and instances of this character are later mentioned.

Transit having been authorized to acquire the White Lines' right only, so that it might perform in the future operations similar in character to those approved in the *Barker* case, it is most significant to observe that approval of the transaction involved in that case was granted only so that the railroad affiliated applicant there could perform what was described as a "new form of service which should

167 prove of much public advantage" by enabling the acquiring railroad affiliate to use motor vehicles as an "auxiliary or adjunct to railroad service, particularly less-than-carload service", which "coordination of rail and motor-vehicle operations should be encouraged" and would not "unduly restrain competition". The approved "auxiliary or supplementary to train service" was described as "best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called 'station-to-station service'". On the other hand, disapproved operations were described as "over-highway truck service" not "auxiliary to \* \* \* rail operations".

"operations . . . which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier."

In the light of the foregoing, it is impossible to accept the premise that Transit was misled into a belief that it was being authorized to acquire any right for the purpose of, or with the intent that it should, conduct any operations not strictly auxiliary or supplementary to the rail service of its proprietary railroad. There is likewise no logical basis for any assumption on its part that the intent of the *Barker* reports, which by expressed reference was also made the intent of the report in No. MC-F-445, was that the phrase "auxiliary to, or supplemental of, rail service" should mean that the rail carrier affiliate there, and Transit here, were to be allowed to engage in motor carrier operations wholly independent of rail service so long as performed only to and from points at which the railroad had stations or, as now put, so long as confined geographically to rail-service territory. If this had been the intent it could and certainly would have been conveyed more simply and directly. It would, however, have been a non sequitur to the whole purport of the discussion and conclusions in that report with respect to railroad operation of

168 motor vehicles. If a geographic limitation only was intended, then all that was necessary was accomplished by the specifically imposed restriction of the future service to points which were stations on the railroad. Obviously the *further* limitation to "auxiliary and supplementary service" meant something more. The phrase in question which was used to describe the type of operation or "new form of service" being approved, cannot be considered as synonymous to the conduct of motor carrier operations totally independent of rail service, competitive with the railroad and with other motor carriers in their own field, which operations were the very type which was specifically disapproved. In these circumstances, the dropping by Division 5 of the examiner's recommended restriction of future operations to service performed at rail rates is not significant. Such a limitation is inherent in the concept of a future service which should be no more than "auxiliary to or supplemental" of train service, and was shown so to be by the discussion of approved and disapproved operations.

Transit's claimed interpretation would attribute to this Commission the rendering of little more than lip service

to the Congressional intent that we should regulate all modes of transportation impartially so as to foster, promote, and preserve the inherent advantages of each and to protect each from the suppression or strangulation which might follow if control thereof were allowed to fall into the hands of a competing transportation agency. This, assuredly, was neither the intent of the *Barker case* nor of division 5's report approving Transit's purchase of the White Lines' rights. There is no merit, therefore, to the contention that the acquisition by Transit was originally approved by division 5, with any thought or intent that Transit's future service should encompass operations identical with and directly competitive with those conducted by motor carriers not affiliated with the railroad.

169 The required statutory findings in the basic finance report that the purchase would be consistent with the public interest were expressly predicated upon the showing that the proprietary railroad, not Transit, would be enabled thereby to use motor service to public advantage in its *rail operations*. And in order to insure against the rendition of any other type of service, approval of the acquisition was further made subject to a reserved right to impose any conditions found necessary in the future to prevent a deviation by Transit from the auxiliary or supplementary service intended to be allowed. Even if the discussion of the *Barker case*, and of approved and disapproved operations be ignored, the latter reservation alone was enough to put Transit on notice, before it consummated the transaction or made any other expenditures, as to the type of future operations which were contemplated. When all the discussion in the original report herein and in the cited *Barker* report is added to the specifically reserved right to restrict, it completely forecloses any suggestion now by Transit that it did not appreciate the limitations upon its approved future operations or that it was misled in any way into consummating a transaction which it would not otherwise have done. Nor can Transit by a showing that it has ignored the obviously intended restriction on its operations and has expanded and developed disapproved all-motor operations, build up a bar against our exercise of the specifically reserved right to restrict. There is no merit in Transit's claim that it was misled through lack of adequate notice as to the type of approved future operations into consummating a transaction or making expenditures it would not otherwise have made.

Approaching its problem from another angle Transit, apparently assuming or conceding for the moment that its approved future operations were limited to those auxiliary to or supplemental of rail service, asserts, in effect, that since the original report of division 5 herein, we, ourselves, have tightened our concept of what is auxiliary to, or supplemental of, rail service, and that we are now insisting upon a construction more confining than was our thought when its purchase of the White Lines' rights was approved. It cites several cases which it claims show that its interpretation of the phrase "auxiliary or supplementary to rail service" represented also the Commission's view prior to our report on reconsideration herein. Its reference to certain of these is limited to a quoting of separate expressions of individual Commissioners. These require no comment. Others will be examined briefly.

The first case cited is the *Kansas City Southern case*, *supra*. In a report on reconsideration therein we substituted a so-called key-point restriction for a previously imposed rail-haul condition. This restriction, while prohibiting the transportation by motor vehicle of shipments between designated key points, permitted such transportation between points intermediate to key points (when not involving movement between key points) and between a single key point and an intermediate non-key point. Transit argues that we thereby permitted the affected carriers to transact business at rail points in the same manner as any other motor-common carrier except to the extent prohibited by the key-point restriction. Apparently, however, to maintain the consistency of its position herein that such phrase is meaningless, it omits mention of the fact that by an additionally imposed condition we also definitely restricted the authorized service by motor vehicle between *whatever points* it was conducted "to service which is auxiliary to, or supplemental of", rail service. Transit's refusal to accord any significance to this phrase as descriptive of the character of operations authorized either in the *Kansas City Southern case* or in the instant proceedings—  
 171 constitutes, as we see it, the basic fallacy of its position here, and ignores completely the somewhat lengthy discussion thereof in the *Barker case*. It is true that subsequent to the *Barker* and *Kansas City Southern cases* the meaning of the term "auxiliary to and supplementary of" was spelled out in greater detail in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721,

wherein we denied a petition for reconsideration, but no place can there be found any suggestion of any *extension* of the principles approved in the *Barker and Kansas City Southern* cases. Instead, in the *Texas and Pacific* case, we have only emphasis and amplification in the following language, of what was already apparent from a careful reading:

[This condition] *limits the character of service to be performed . . . to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. It permits the public to receive an improved rail service through the use of trucks instead of trains as a means of fulfilling the railway's undertaking to transport. Petitioner's status as a common carrier by motor vehicle is not dependent upon its having direct dealings with the shipping public. . . . [This condition] permits all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. . . . Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the rail service. . . .* (Emphasis added.)

Also cited is *Rock Island Motor Transit Co. Extension—Wellman, Iowa*, 31 M. C. C. 643, wherein we granted Transit unrestricted motor-carrier authority under section 207 of the act. There we found that evidence of unusual circumstances established that public convenience and necessity required the issuance of a certificate to perform all-motor operations independently of rail service, and that the carrier so operating would not invade the territory of other rail lines or endanger or impair the operations of existing motor carriers. Thus, we specifically found a need for a service not limited to a service auxiliary or supplementary to rail service. This case is without significance here, for as we indicated in the prior report herein, *special circumstances* may prevail justifying the issuance of unrestricted motor-carrier authority to a rail applicant; and the case cited, and there are others, is but an example of such circumstances. No such special circumstances are present in the instant proceedings.

The final case cited is *Pacific M. Trucking Co.—Purchase—Valley M. Lines, Inc.*, *supra*, wherein division 4 expressed the view that the phrase "auxiliary and supplementary to

rail service" as used by division 5 in the *Barker case* was not intended to be a prohibition against all motor-carrier service directly for the shipping public in addition to, in substitution for, and in lieu of, rail service. We do not consider it necessary to discuss the view contained in this report in detail, for they are at variance with our views on the subject as expressed herein and in the prior report. In this connection, it may be noted that division 4's report was rendered December 23, 1943, almost a year after division 5's report of Jan. 1, 1943, in *Texas & Pacific M. Transport Co. Com. Car. Application, supra*, wherein the phrase was precisely defined. To the extent it is inconsistent with the decision of division 5 it must be deemed to have been disapproved by our subsequent denial on Feb. 14, 1944, of a petition for reconsideration of the division 5 decision.

We conclude that approval of the acquisition by Transit was solely for the purpose of enabling Transit to perform a service auxiliary to and supplemental of rail service; that such intent or purpose was adequately evidenced 173 by the report of division 5 including the reservation of a right specifically to restrict if need should be found; that Transit has no cause for any complaint that it was mislead to its prejudice and that our concept at the time of the original decision herein, as to what constitutes service auxiliary to or supplemental of rail service, though now described in greater detail, has not been revised to Transit's prejudice, and that there is no element of unfairness in our exercise now of any authority which we have to restrict future operations. This disposes of the first five points made by Transit as above set forth.

*Authority now to impose specific restrictions; due process; section 212.* The foregoing brings us to the question of our exercise now of the authority reserved by division 5 to impose specific conditions or restrictions calculated to insure that Transit's operations from this point on shall be limited, as originally intended, to operations definitely auxiliary to or supplemental of rail service. Despite the specific reservation of authority by division 5 and a provision in Transit's certificate stating that it is subject to such reservation, Transit challenges our right now to impose the restrictions set forth in the prior report on reconsideration saying that their imposition would amount to a deprivation of property without due process and a diminution or partial revocation of its presently held cer-

tificate in disregard of section 212(a) of the act. As indicating the possible extent of its damage Transit cites its annual report to this Commission for 1945 showing: an investment of \$113,870 for the purchase of motor-carrier operating rights; the transportation by truck during that year of 188,499 tons of general freight producing a revenue of \$1,648,087; the employment of about 363 persons; and an annual payroll of \$1,006,258. It claims that the findings in our prior report will have a serious effect on these items, and will damage it to the extent of \$500,000 or more in annual revenue.

174 To some extent Transit's position in this respect appears to rest upon the argument already considered that the proposed conditions as they are construed by us are more restrictive than anything originally intended and therefore beyond our reserved authority. This argument already has been discussed and overruled. The proposed restrictions construed as above indicated represent no tightening of any earlier concept and the only question now is our power to exercise our specifically reserved authority. It is difficult to conceive of a serious challenge of this power. The exercise of a specifically reserved right subject to which investments have been made does not amount to a deprivation of property or any other right without due process. Neither does it amount to a partial revocation of the operating authority granted by Transit's presently held certificate contrary to section 212(a) of the act. That certificate by its very terms always has been subject to our right, if need should be found, to impose specific restrictions. It never granted an unlimited operating right and imposition now of the proposed restrictions, which will have no effect except to guarantee what was originally intended and should have been understood by Transit, will not take anything away. Transit cites several cases dealing with our power to act with respect to certificates already issued. For the reasons indicated we do not consider them in point but nevertheless, they will be discussed.

First among them is *Campbell Sixty-Six Exp., Inc. v. Frisco Transp. Co., supra*. The issue therein was whether the Frisco Transportation Company, a railroad subsidiary, was conducting operations as a motor common carrier which were beyond the terms of and in violation of the terms of its certificates. The only condition contained in its certificates was one, like that in Transit's certificate

here involved, reserving the right later to impose  
 175 conditions on the operations in order to insure that  
 the service rendered would be auxiliary or supple-  
 mentary to rail service.—No specific conditions were in-  
 cluded limiting the operations to that type of service. We  
 found that in determining whether described operations  
 were in violation of the outstanding certificates, we could  
 look only to the certificates themselves and not to any intent,  
 underlying the basic acquisition proceedings, that service  
 should be limited to an auxiliary or supplementary service.  
 We stated:

As we find that the service which the Transportation  
 Company may perform is to be determined from a  
 consideration of the certificates it now holds, it is un-  
 necessary to consider the arguments and contentions  
 here made concerning our power now to impose limi-  
 tations, conditions, or restrictions respecting the type  
 of service which the Transportation Company should  
 be permitted to perform. *Nothing that we say here,*  
*however, should be taken as an indication that the*  
*certificates now held by the Transportation Company*  
*may not be corrected to reflect the intent of the find-*  
*ings in the acquisition proceedings or that restric-*  
*tions may not be imposed now in some or all of the*  
*certificates held by the Transportation Company*  
*which will have the effect of limiting the service there-*  
*under to that which is auxiliary to or supplementary*  
*of the rail service of its parent company and preclude*  
*it from performing a direct and independent motor*  
*common carrier service. . . . Since the prior re-*  
*port, a number of the proceedings pursuant to which*  
*certificates were issued to the Transportation Com-*  
*pany have in fact been reopened for further hearing,*  
*the conditions, if any, which may and should be im-*  
*posed will be considered in the reopened proceedings.*  
 [Emphasis added.]

Since the certificates themselves contained no restrictions  
 as to the character of service, we found that the unrestricted  
 operations being performed pursuant thereto conse-  
 quently could not be found to be unlawful and in  
 176 violation of the certificates. That case would be a  
 controlling precedent if we were here concerned with  
 any question as to the present lawfulness of Transit's pres-  
 ent all-motor operations, or whether the certificate in its  
 present form precludes such operations, but we are not. To  
 the contrary, the issue here, is whether we have the power,

pursuant to the right we reserved in the certificate itself, to modify it in a manner to impose conditions aimed at preventing in the future a continued deviation from approved operations. The question of exercising our reserved right and imposing specific conditions in the Frisco certificates which were involved in the *Campbell Sixty-Six* case now is under consideration in a separate proceeding pending before division 5.

Another case relied upon by Transit in *Smith Bros. Revocation of Certificate, supra*, which involved, among others, the question whether a carrier's complete cessation of operations under its certificate automatically and without further proceedings on our part caused a termination of the certificate by reason of a provision therein that the certificate should remain in force for such period as the carrier continued to perform the services authorized therein. It was contended that this provision constituted a self-executing forfeiture of the certificate. We rejected the argument and found that we could revoke or terminate a certificate only through a proceeding under section 212(a) of the Act.

As already indicated Transit's certificate from the day of its issuance has been subject to our reserved right to restrict. Consequently the exercise now of that right does not amount to a partial revocation and this is true even though, under the doctrine of the *Campbell Sixty-Six* case, we can not now condemn as unlawful operations beyond our intent which are not specifically prohibited by the certificate in its present form.

177 The *Seatrain* case, *supra*, is also relied on by Transit. It involved a certificate issued under Part III of the act authorizing the transportation by a water carrier of commodities generally between certain ports, subject to "such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." Later, we reopened the proceeding on our own motion for the purpose of determining whether the certificate should be modified so as to deprive Seatrain of the right to carry commodities generally. Finding that we had the authority so to do, the certificate was canceled and a new one issued which, in effect, reduced from a commodity standpoint the authority originally granted. Construing our action as constituting a revocation or substantial diminution of the rights described in the original certificate, the Supreme Court stated:

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded \* \* \* that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation \* \* \* included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Re Foss Launch & Tug Co.*, 260 I. C. C. 103 \* \* \*. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not authorize water carriage of loaded or unloaded freight cars—so-called "car-ferry service". Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*.

178. This conclusion is supported by the fact that in prior proceedings \* \* \* the Commission had rejected the contention that Seatrain's vessels could be classed as "car ferries", and had concluded that they were ocean-going water carriers.

It is argued, however, that this proceeding does not affect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under section 309 (d) \* \* \* to fix "terms, conditions, and limitations" for water carrier certificate holders. Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt. \* \* \*. It is of some significance that section 208 \* \* \*, which prescribes the authority of the Commission in granting certificates to motor carriers, authorizes the Commission to "specify the service to be rendered" by those carriers \* \* \*. But section 309, which empowers the Commission to grant certificates to water carriers, does not authorize the Commission to specify "the service to be rendered". Furthermore, section 309(d)

relating to water carrier certificates, specifically provides "That no terms, conditions, or limitations, shall restrict the right of the carrier to add to its equipment facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require \* \* \*". The language of this section would seem to preclude the Commission from attaching terms and conditions to a certificate which would deprive the public of the best type of service which could be rendered between ports by a water carrier. In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this respect are not controlling as to the Commission's power to regulate the details of the service of water carriers. We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix "terms and conditions".

179 Summarizing, the court's disapproval of our action in charging Seatrain's certificate was predicated on the following grounds: (1) we were not merely seeking to correct an inadvertent error contained in the original certificate, but were attempting to invoke a new policy with respect to water carriers which was different from that existing at the time the certificate was issued, (2) the changes we made constituted a revocation or substantial diminution of the right granted in the original certificate, (3) Part III of the act does not give us authority to revoke certificates granted water carriers, (4) section 309(d) empowering us to "fix terms, conditions, and limitations" for certificate holders would have constituted doubtful authority for the imposition in the original certificate of a restriction as to the type of service a water carrier may utilize in serving its shippers, and even more doubtful authority for doing so after the certificate has been issued, (5) unlike Part II with respect to motor carriers, Part III does not authorize us to specify in certificates the service to be rendered by water carriers, (6) Section 309(d), providing that no terms, conditions, or limitations shall be imposed in certificates to restrict the right of a water carrier to add to its equipment, facilities, or service, precludes us from attaching terms and conditions which would deprive the public of the best type of service of which water carriers are capable, and (7) our authority under

section 315(c) to suspend, modify, or set aside our orders does not apply to certificates.

Section 5, as did former section 213, gives us broad power to impose conditions in approving transactions arising thereunder. There can be no question of our power when approving Transit's acquisition to impose conditions modifying the operating rights involved to whatever extent necessary to justify our approval, including the condition reserving the right to effect such modification in the future, if such action should be found necessary, to insure that the service subsequently rendered corresponds to the character of service for which approval was granted. There can also be no question as to our authority to attach to motor-carrier certificates, terms and conditions specifying the services authorized, for section 208(a)<sup>8</sup> of the act expressly gives us such authority; and, as seen, the court described this as a distinguishing feature between Part II and Part III of the act. Likewise, the Supreme Court has upheld our authority to impose conditions of the type here in question on the motor-carrier operating rights of railroads and their affiliates. *Interstate Commerce Commission v. Parker*, 326 U. S. 60. Accordingly, the decision in question could, at most, be considered controlling here only if the conditions prescribed in our prior report amounted in effect to a new concept or new construction conceived since the certificate was issued, and for that reason constituted a partial revocation or diminution of the operating rights granted in the certificate. That possibility has already been discussed at length and negatived. Further consideration thereof at this point is unnecessary.

The type of future operations of Transit which were sanctioned by the approval of its acquisition of the White Lines' operating rights was well indicated at the time, but in view of the specific tenor of its approval division 5 did not then deem it necessary to impose definite restrictions. It did, however, recognize that such restrictions might prove necessary and specifically reserved, in its report and in the certificate itself, the right later to impose any conditions which might be needed to that end. The conditions

<sup>8</sup> Section 208(a) provides that any certificate issued under section 206 or 207 shall "specify the service to be rendered" and, significantly, that "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

prescribed in our prior report are for that purpose, and definitely are not, as in the *Seatrains* case, an attempt on our part to invoke a new policy which did not pertain at the time Transit's purchase was approved and the certificate was issued. Before Transit consummated the transaction it thus had knowledge of the type of service intended to be authorized and was put on notice that conditions might later be imposed if they were made necessary by a subsequent performance on its part of a service not auxiliary or supplementary to the train service of its proprietary railroad and not approved. To do now that which we specifically reserved the right to do does not constitute a partial revocation of the certificate within the purview of the *Seatrains* case. Were it otherwise the reservation of such right would have been meaningless. That it is not meaningless, is clearly indicated in the following excerpt from the Court's decision in *Interstate Commerce Commission v. Parker, supra*:

*As a further assurance that (the carrier) might not inadvertently have received privileges beyond the Commission's intention to grant, a right was reserved by the Commission to impose such further specific conditions as it might find necessary in the future to restrict (its) operation "to service which is auxiliary to, or supplemental of, rail service."*

Other differentiations [between certificates granted railroads and their affiliates and those granted the normal over-the-road motor-carriers] are found in the limitation of service to rail station points and the condition that the Commission reserved the right to impose such other requirements as might be found necessary to restrict the rail subsidiary to coordinated rail service instead of permitting general competition with motor carriers in over-the-road service.

Everything considered, it is our opinion, and we find that we have adequate authority by reason of the

182 right specifically reserved to reopen this proceeding and impose any conditions on the operations in question which we find are necessary to insure that the service shall in the future be limited to that which is auxiliary to, or supplemental of, train service and shall not unduly restrain competition.

*Arbitrariness; want of evidence; and discrimination.*  
The charge that the imposition now of restrictions of the

type indicated would be arbitrary is apparently but another way of saying that, assuming our power, there is no evidence of record justifying such action. Transit's tariffs clearly hold out an all-motor service not connected with the rail service and at motor rates different from the rail rates. Moreover, the performance of service unrelated to rail service on an extensive scale is freely admitted by Transit. The magnitude of such operations and, by the same token, the importance of the invasion by the railroad of the field of all-motor service is graphically shown by its argument above that imposition of the proposed restrictions will damage it to the extent of \$500,000 or more in annual revenue. That we have ample basis, indeed obligation, for the imposition of any appropriate restrictions is apparent. In this connection it may be observed also that since our prior report on reconsideration herein the proceeding has been reopened for a further hearing at which it was Transit's privilege and duty to offer any evidence which it had bearing upon the necessity or not for the proposed restrictions and the form which they should take if imposed, particularly as respects the naming of so-called key points. This opportunity it neglected, opposing the further hearing for any purpose. The inference is warranted that it is unable to refute the need for the restrictions and that those imposed in the prior report on reconsideration are acceptable in form provided any must be accepted.

183 The assertion that imposition of the proposed restrictions discriminates generally against motor carrier affiliates of railroads hardly merits mention. The act itself imposes a special burden of proof on railroad or railroad-affiliates seeking to acquire motor carriers. As more fully set forth in our prior report on reconsideration herein, the national transportation policy and the public interest require that, except in unusual circumstances not here present, railroads with their immense resources and competitive strength shall not be allowed to enter the motor carrier field and to compete as a motor carrier with others in that field. Motor operations in aid of rail service, so-called auxiliary and supplementary services are, however, allowable subject to restrictions designed to confine them as such. The imposition of such restrictions clearly is not an unlawful discrimination against railroad or railroad-affiliated motor carriers. On the contrary they have been approved and encouraged by the courts in several of the above-cited cases, particularly *Interstate Commerce Commission v. Parker*.

This concludes our discussion of the issues in No. MC-F-445. Each of Transit's arguments has been carefully considered. We have no doubt of our authority and duty in this proceeding to impose restrictions which will insure that Transit's future operations under the authority acquired from White Lines will be strictly confined to those which are auxiliary to or supplemental to rail service. We are also satisfied that the restrictions imposed to that end in our prior report on reconsideration are fair and adequate to that end. Our prior findings in this case will accordingly be affirmed. Should experience demonstrate that any of the restrictions imposed are impracticable or unnecessarily restrictive Transit may file an appropriate petition for modification.

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No. MC-F-2327

Repeating briefly, this proceeding was initiated by application filed September 29, 1943, in which Transit sought approval under section 5 of the act (formerly section 213) of its proposed purchase of certain operating rights of Frederickson & Son,—namely, the right to transport general commodities, with exceptions, between Harlan, Iowa, and Omaha over Iowa Highway 64, and between Avoca and Atlantic, Iowa, over a one-directional loop-route consisting of U. S. Highway 59 from Avoca to junction U. S. Highway 6, of U. S. Highway 6 from that point to Atlantic, and of Iowa Highway 83 from Atlantic back to Avoca. Division 4 approved the application November 28, 1944, finding that the proposed purchase—

... will enable *The Chicago, Rock Island and Pacific Railway Company* ... to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition ... (emphasis added).

No restrictions or conditions were, however, imposed specifically limiting the future operations to a service auxiliary or supplementary to rail service of the railroad, nor was there a reservation of the right so to restrict in the future. The transaction was consummated January 22, 1945, and operations under the acquired rights were begun by Transit on or about the same date. Thereafter, but before a certificate was issued to Transit, the proceeding was reopened on our own motion, and in the prior report on reconsideration herein the future operations of Transit under the acquired rights were made subject to the same restrictions, set forth above, as were imposed on the

tions involved in No. MC-F-445. Two important considerations at once tend to differentiate somewhat the issues in this proceeding from those in No. MC-F-445: (1) approval of the acquisition was not coupled with any reservation of a right later to restrict, but (2) no certificate had been issued when the proceeding was reopened and the restrictions imposed. Transit seeking the benefit of section 212 and endeavoring to minimize the effect of the fact that no certificate has been issued urges that the transaction having been approved and consummated and the time for filing of petitions for reopening or reconsideration by interested parties having expired, the issuance of a certificate to it was a ministerial act only which we were bound to perform; that, accordingly, the certificate should be considered as issued and as within the protection of section 212; and that our power to modify in a manner partially to revoke was not enhanced by our alleged neglect of our ministerial duty to issue.

Examined carefully the argument will be seen to be unsound. Section 212 by its terms is operative only in respect of certificates, permits, and licenses. Compare *Gregg Cartage v. U. S.*, 316 U. S. 74. Division 4's order of November 28, 1944, authorizing the acquisition of the Frederickson operating rights was entered pursuant to paragraph (2) of section 5 of the act. Paragraph (9) of this same section provides that—

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph . . . (2), . . . as it may deem necessary or appropriate.

Identical language appeared in former section 213(d) and was incorporated in the above section upon transfer of the substance of section 213 to amended section 5 by the Transportation Act, 1940. Pertinent also in this connection are sections 221(b) and 17(6) and (7). Section 221(b) provides that—

Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

tion 205(h) are made applicable also to all proceedings under Part II, empowers us to grant applications for rehearing, reargument, or reconsideration of our orders, and pursuant thereto to reverse, change, or modify the same. Our power in this regard was described in *Smith Bros. Revocation of Certificate, supra*, as follows:

*We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated. \* \* \** (Emphasis added.)

This expression of our authority was referred to by the Supreme Court with implied approval in the *Seatrains case, supra*:

\* \* \* But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.

In *Crescent Express Lines v. U. S.*, 320 U. S. 401, the court, citing section 221(b), held that the so-called compliance order involved therein remained under our control, and sustained our action in authorizing by subsequent order the issuance of a certificate more limited in scope than the one issuance of which was originally authorized by the compliance order. In *McArthur v. United States*, 44 Fed. Supp. 697, affirmed per curiam in 315 U. S. 787, the lower court held that a compliance order authorizing the issuance of a certificate was not a final order and by its own terms and within the lawful authority of the Commission could be set aside and vacated with or without notice to the applicants, and it sustained the subsequent order of the Commission denying the application involved. In *Sprague v. Woll*, 122 F. 2d 128, (certiorari denied, 314 U. S. 669) the court held that under section 16a [reenacted in September 1940 as section 17(6)] our power to reopen orders was not limited to instances where petitions therefor are received, but must include the power to do so on our own motion when such action appears necessary. Division 5 reached a similar conclusion in *Carpenter Common Carrier Application*, 32 M. C. C. 580, saying:

The act gives us the power, on our motion, to reconsider previous orders, and we conclude that our action [on its own motion reopening the proceeding for further hearing] in this proceeding was proper.

Thus, our power to reopen the Frederickson proceeding and to issue supplemental orders therein is conferred by the statute itself, and Transit must be presumed to have been aware of this power when it consummated the transaction. Nor does the fact that it may, in reliance upon the original order, have made expenditures it would not otherwise have made operate as a bar to the exercise of this power. Compare *Baldwin v. Milling Co.*, 307 U. S. 478. In this connection it may, further, be observed that Transit could have protected itself from the contingency of which it now complains had it arranged in its contract that its payment upon consummation of the purchase should be placed in escrow until a certificate were issued to it or should be refunded should no certificate be issued.

188. The Frederickson operating rights are small compared to those involved in No. MC-F-445 and other than the contention just considered, (that the case should be considered as if the certificate were issued) Transit makes no arguments addressed particularly to this case. In a general way, however, all of its arguments, above considered in connection with No. MC-F-445 appear to be made also in this case. Having concluded that the situation is *not* the same as in No. MC-F-445 the arguments in that case respecting our authority in the face of section 212 and the due process requirement, to impose any restrictions need not be considered further. Neither do the remaining arguments require extended discussion.

Since, as above seen, we reopened the proceeding while it was yet under our control for the imposition of specific restrictions, the intent of Division 4 in approving the acquisition without the imposition of any restrictions might be said to be immaterial now. Examination will, however, clearly disclose what the intent was and will show it to be entirely consistent with the restrictions imposed in the prior report on reconsideration.

The decision of division 4 (not reported in full) shows that the acquisition was approved solely to enable Transit to perform an auxiliary and supplementary service. It described the railroads' manner of operation; the manner of handling of rail traffic over the White Lines' routes which departed at this point from the main line of the railroad; the manner in which the railroads' shipments would be

handled if the acquisition were approved; the anticipated savings in rail operating costs, in freight cars, in avoidance of rail terminal congestion, and in the more efficient use of man power; and the expedition of rail traffic which would be achieved. Public witnesses stressed the need for the improvements which would result from coordinated rail-motor service. The remaining independent all-189 motor services were discussed, and it was found that the acquisition by Transit would not unduly restrain competition. The matter of appropriate restrictions was considered, and it was said that Transit opposed any prior-or-subsequent rail-haul restriction because impracticable. Although railroad "breakbulk" points had not been finally determined, the question of an alternative key point restriction was then considered, but was found impracticable also because of the relatively limited scope of the Frederickson operation and because the connecting White Lines' operating rights were then unrestricted. It, apparently, was assumed erroneously that a naming of key points in connection with this operation would limit also the partially duplicating White Lines' route. In view of the assumed impracticability of either a key-point or prior-or-subsequent rail-haul restriction, no restrictions at all were imposed, but it is clear beyond any doubt that the acquisition was approved solely to enable Transit to improve the auxiliary and supplementary service which it was already performing under the previously acquired White Lines' operating rights. It was specifically found that the less-than-carload service of the railroad was uneconomical, inefficient, and slow; that the proposed operations by Transit under the Frederickson operating rights could be used to advantage of the railroad and the public "by speeding up deliveries . . . and releasing rail cars." Only one sentence in the entire report refers to any proposal by Transit to perform any long haul all-motor service independent of the railroad service, and it is clear that approval of the acquisition was not for the purpose of enabling any such service.

Nor can there be, in this case, any argument that Transit did not at the time it consummated the purchase understand what was meant by an auxiliary or supplementary service or that our present views reflect a changed 190 or "tortured construction" of our original concept. The report of division 4 approving the purchase followed by more than 22 months the report (41 M. C. C. 721)

in the *Texas and Pacific* case in which there was spelled out in detail the limits and details of auxiliary and supplementary service. As seen, division 4 had made it clear that the acquisition had been approved solely to enable Transit to perform an auxiliary and supplementary service. Every expenditure which Transit has made in acquiring or operating the Frederickson rights has been made with full notice of the purpose for which the acquisition was authorized and without any possible misunderstanding. Clearly, there is no hardship or element of unfairness in our reopening the proceeding before issuance of the certificate for the purpose of imposing restrictions calculated to insure that the future operations did not exceed our intent.

We have already referred to the scope and importance of Transit's admitted all-motor operations independently of the railroad and its failure at the further hearing to offer any proof tending to establish that the restrictions imposed in the prior report are impracticable in any way or unwarranted by the facts. Imposition here of the same restrictions is neither arbitrary, unsupported by the facts, nor discriminatory.

In connection with such restrictions one other point should, however, be mentioned. Transit, in connection with this case only, contends that the designation in the prior report or reconsideration of key points located off the particular routes here involved was and will be improper. The practice is not a new one and Transit's objection appears to be based on the erroneous assumption that naming of a key-point on a connecting route off of the particular route intended to be restricted would have the effect of restricting also operations over the connecting route. Actually this is not the result. The naming of what may be called an off-route key point does not operate as a limitation or diminution of the authorized operations over the connecting routes on which such points may physically be located, but solely as a limitation upon the service which may be performed over the routes directly involved when used in connection with such other routes. Compare *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 43 M. C. C. 470, and *Pennsylvania Truck Lines, Inc., Extension—Lebanon, Ohio.*, .... M. C. C. ... (No. MC-19201 (Sub No. 34), decided January 6, 1948).

Official notice will be taken of the transfer of the properties of The Chicago, Rock Island and Pacific Railway

Company (Joseph B. Fleming and Aaron Colnon, Trustees) to The Chicago, Rock Island and Pacific Railroad Company, described in footnote 2, and effect will be given thereto in our findings.

### FINDINGS.

Upon further hearing we affirm our prior findings, in No. MC-F-445, that the certificate heretofore issued to The Rock Island Motor Transit Company in No. MC-29130, to the extent it embraces the motor-common carrier rights acquired by the transaction authorized and approved in No. MC-F-445, should be modified so as to require that all future operations thereunder be conducted subject to the following conditions and restrictions:

1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railroad Company, hereinafter called the Railroad.
  2. The Rock Island Motor Transit Company shall not render any service to or from any point not a station on a rail line of the Railroad.
  3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.
  4. All contractual arrangements between The Rock Island Motor Transit Company and the Railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.
  5. Such further specific conditions as we, in the future, find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.
- In No. MC-F-2327, we also affirm our prior findings that the order of division 4 approving the proposed transaction, should be modified so as to subject operations by the Rock Island Motor Transit Company under the certificate to be issued covering the operating rights acquired from Fredrickson to the conditions and restrictions set forth in the preceding finding.

An appropriate order will be entered.

MILLER, *Commissioner*, dissenting:

I dissent from the findings of the majority for reasons generally set forth in my dissenting expression in the prior report on reconsideration. The further hearing which has now been held resulted in no new or additional evidence, the instant decision, therefore, for all practical purposes being a report on reconsideration only. It affords no basis for the action taken. Although our authority to impose conditions to approval of transactions under section 5 is broad, the action of the majority is not a prescription of conditions to approval of these two section 5 matters; it is a direct revocation of a portion of the certificates of The Rock Island Transit Company in a manner other than as authorized in section 212. The action is taken in order to execute a "new policy" and is not distinguishable from the action which was condemned by the Supreme Court in the *Seatrail* case.

I am authorized to state that *Chairman Mahaffie* and *Commissioner Mitchell* join in this expression.

194.

#### ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of April, A. D. 1949.

No. MC-F-445

THE ROCK ISLAND MOTOR TRANSPORT COMPANY—PURCHASE  
—WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED,  
ET AL.

No. MC-F-2327

THE CHICAGO ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON.

No. MC-29130

(Formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT CO. COMMON CARRIER  
APPLICATION.

*It appearing*, That in the above-entitled proceedings, the Commission, divisions 5 and 4, respectively, authorized The Rock Island Motor Transit Company to acquire by purchases, which have been consummated, certain operating rights as a common carrier by motor vehicle;

*It further appearing,* That by a report and order 195 of March 4, 1946, on reconsideration in the above-entitled proceedings, 40 M. C. C. 457, the Commission ordered that conduct of the described motor-common carrier operations by The Rock Island Transit Company be made subject to the conditions and restrictions set forth in the findings of the said report on reconsideration;

*It further appearing,* That by order of June 9, 1947, the above-entitled proceedings were reopened for further hearing solely with respect to certain matters;

*And it further appearing,* That such further hearing of the matters and things involved has been held, and that the Commission, on the date hereof, has made and filed a report on further hearing herein containing its findings of fact and conclusions thereon, which report and the prior reports and orders in said proceedings are hereby referred to and made a part hereof:

*It is ordered,* That the certificate heretofore issued in No. MC-29130, to the extent it embraces the operating rights acquired by the transaction approved and authorized in No. MC-F-445, be, and it is hereby, modified to the extent shown in said report on further hearing; that in all other respects the provisions of said certificate shall remain in full force and effect; and that an amended certificate be issued to The Rock Island Motor Transit Company.

*It is further ordered;* That the certificate to be issued to The Rock Island Motor Transit Company representing the operating rights acquired by the transaction approved and authorized in No. MC-F-2327, be framed so as to make the motor-common carrier operations authorized thereby subject to the conditions and restrictions set forth in the findings of the said report on further hearing.

*And it is further ordered,* That this order shall be effective May 31, 1949.

By the Commission.  
(SEAL)

W. P. BARTEL,  
Secretary.

In the District Court of the United States  
197 *Answer of Interstate Commerce Commission*  
(Title Omitted)  
(Filed Aug. 19, 1949)

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled

action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

### I

The Commission admits the allegations of paragraph I of the complaint.

### II

Answering the allegations of paragraph II of the complaint, the Commission admits that this Court has jurisdiction of the action herein and venue of the parties thereto.

### III

Answering paragraph III of the complaint, the Commission admits that plaintiff is a common carrier, as authorized by the Commission, engaged in the transportation of property in interstate commerce, and that plaintiff is a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad. Further answering the allegations of paragraph III of the complaint, the Commission alleges that such allegations have or will be sufficiently answered herein, are immaterial to issues herein and require no answer, or are not within the information of the Commission and therefore are neither admitted nor denied.

### IV

Answering the allegations of paragraph IV of the complaint, the Commission alleges that such allegations are otherwise sufficiently answered herein, are immaterial to the issues herein and require no answer, or are not within the knowledge of the Commission and therefore are neither admitted nor denied.

### V

Answering the remaining allegations of the complaint, the Commission alleges that the proceedings herein involved were begun upon the filing by plaintiff of an application filed October 13, 1937, under the provisions of Section 213 of the Motor Carrier Act, 1935 (49 U. S. C. 313), for approval by the Commission of purchase by and transfer to the plaintiff of certain motor carrier operating authority, in interstate commerce, then held or being oper-

ated by the White Line Motor Freight Company, Inc., and White Line Trucking Company, with other properties not here involved, an application for a certificate evidencing and authorizing such operations by said White motor carrier companies, being on file with and pending before said Commission, awaiting final determination thereof, all of which contemplated approval by the Commission of the substitution of plaintiff corporation for the said White

Companies, as the applicant in the pending White applications; that on October 23, 1937, an order of the Commission was entered assigning said application for purchase and transfer for hearing, which was held before an Examiner of the Commission, in the city of Chicago, on November 19, 1937, at which said hearing plaintiff and other parties were represented by counsel and submitted evidence, in the form of testimony of witnesses and exhibits; that thereafter briefs were submitted by plaintiff and other parties and the hearing Examiner, on February 12, 1938, submitted his recommended report and order, to which various parties to the proceeding, including plaintiff, filed exceptions; that thereafter on April 1, 1938, Division 5 of the Commission entered its report and order (5 M. C. C. 451; Exhibit 3 to complaint), wherein and whereby the purchase by and transfer to plaintiff of the operating motor carrier rights of the said White companies was approved, including the right to operate pending decision upon the "grandfather" applications, in which plaintiff was substituted as the applicant, upon certain terms and conditions found to be reasonable, and with certain proviso limitations of service to be rendered, as is more fully stated in said report, the order of the same date authorizing consummation of the transaction, upon notice to the Commission of intention to do so, and compliance with Sections 215, 217, and 221 of the said Act; that thereafter upon completion of consideration of said "grandfather" application a certificate was issued to plaintiff, as the successor in interest to the said White companies and as the substitute applicant, on December 3, 1941 (Exhibit 6 to complaint); that in a similar proceeding plaintiff applied for Commission approval of purchase and transfer of certain operating authority as a motor common carrier, held by the partnership of J. H. Frederickson & Son, which was approved by Division 4 order of November 28, 1944, after hearing, in the manner, under the terms and conditions, and author-  
 199 izing certain specific service, which is more fully stated and set forth in said report and order (Exhibit 7 to complaint); that from time to time plaintiff

obtained operating authority under Commission orders, in addition to that obtained in the purchase proceedings in the White and Frederickson cases, not here material except as will appear in other proceedings hereinafter set forth; that on February 5, 1945, at a general session the Commission upon its own motion, entered an order reopening for reconsideration on the existing records, the proceedings involved in the said White and Frederickson purchases, and in the common carriers application of plaintiff, solely to determine (a) the conditions or restrictions, if any appeared necessary, which should be imposed to insure that service of plaintiff is limited to that which is supplemental of or auxiliary to rail service, and (b) what if any conditions should be imposed upon the operating authority held by plaintiff to assure the restricted service as in (a), if that should be found necessary, and after intervention by the Regular Common Carrier Conference of the American Trucking Association, the report of the Commission on reconsideration was entered on March 4, 1946 (Exhibit 9 to complaint); that by order of the Commission, entered May 14, 1946, upon request of plaintiff, parties to the proceeding were permitted to file petitions for rehearing, reargument, or reconsideration of the findings in the report of March 4, 1946, such petitions to be filed on or before May 27, 1946, and plaintiff did file on May 27, 1946, its petition for reconsideration and oral argument, to which a reply was filed by the American Trucking Association, on July 1, 1946; that the Commission entered its report on further reconsideration on April 11, 1949 (Exhibit 9 to complaint), wherein there is stated, pages 105, 106 and 107, the facts as to procedure following petition of plaintiff for reconsideration of and oral argument upon the report of March 4, 1946, showing motion of plaintiff to rescind the order reopening the proceedings, the overruling of said motion on October 6, 1947, that a further hearing was held October 9, 1947, at which plaintiff entered a special appearance to contest jurisdiction of the order and offered no witnesses or evidence, and that no evidence was offered by other parties appearing at the hearing, and the said report of April 11, 1949, states fully the basis upon which its findings were entered, to the effect that certificates held by plaintiff, under its own applications and in the White proceedings, should be conditioned and restricted, as stated in five specific restrictions, in order to limit the service of plaintiff to that which is supplemental of or auxiliary to rail

service, and that final approval of the authority in the Frederickson proceeding should be so conditioned and restricted; that on April 11, 1949, the Commission entered an order, that the certificates issued to plaintiff under its own applications and as purchased in the White proceedings, be modified as found and directed in said report of the same date, and that an amended certificate be issued to plaintiff, and that the certificate to be issued plaintiff in the Frederickson purchase proceeding, be made to conform to the conditions and restrictions stated in said report; and that said order was made effective May 31, 1949, which said effective date has been further extended by the Commission to now become effective on October 15, 1949.

## VI

The Commission further alleges that all the parties to said proceeding were given a full and complete hearing; that the findings and conclusions in said report and order entered April 11, 1949, were and are fully supported and justified by the evidence submitted in said proceeding as aforesaid, and that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission further alleges that said report and order were not made or entered either arbitrarily or unjustly or without proof or contrary to the relevant evidence or without evidence to support them; that in making said report and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

## VII

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,  
By: ALLEN CRENSHAW,  
Assistant Chief Counsel.

DANIEL W. KNOWLTON,  
*Chief Counsel,  
 Of Counsel.*

203 *Duly sworn to by John L. Rogers.  
 Jurat omitted in printing.*

205 In the District Court of the United States  
*Answer of the United States of America*  
 (Title Omitted)  
 (Filed Aug. 26, 1949)

Now comes the United States of America, defendant in the above-styled cause, and in response to the complaint filed herein answers and says:

#### I

Answering paragraph I, defendant admits the statement therein contained.

#### II

Answering paragraph II, defendant admits the jurisdiction of this Court over the parties and the subject matter of this suit.

#### III

Answering paragraph III of the complaint, the United States of America admits that the plaintiff is a common carrier, as authorized by the Interstate Commerce Commission, engaged in the transportation of property in interstate commerce, and that the plaintiff is a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad. Further answering the allegations of paragraph III of the complaint, the United States of America alleges that such allegations have been or will be sufficiently answered herein, are immaterial to the issues herein and therefore require no answer, or are not within the information of the United States of America and therefore are neither admitted nor denied.

#### IV

Answering paragraph IV of the complaint, the United States of America alleges that such allegations are otherwise sufficiently answered herein, are immaterial to the

issues herein and therefore require no answer, or are not within the knowledge of the United States of America and therefore are neither admitted nor denied.

• V

Answering the remaining allegations of the complaint, defendant United States of America admits that the plaintiff filed an application on October 13, 1937, under the provisions of Section 213 of the Motor Carrier Act, 1935 (49 U. S. C. 313) for approval by the Commission of purchase by and transfer to the plaintiff of certain motor carrier operating authority, in interstate commerce, then held or being operated by the White Line Motor Freight Company, Inc., and White Line Trucking Company; that an application for a certificate evidencing and authorizing such operations by said White motor carrier companies was then on file with and was pending before the Commission, awaiting final determination thereof, all of which contemplated approval by the Commission of the substitution of the plaintiff for the said White Companies, as the applicant in the pending White application; that after hearing before an Examiner of the Commission and after the Examiner had submitted his recommended report and order, exceptions were duly filed thereto, and that thereafter Division 5 of the Commission entered its report and order (Exhibit 3 to complaint) whereby said purchase by and transfer to the plaintiff of the operating motor carrier rights of said White companies, was approved, including the right to operate pending decision upon the "grandfather" applications, upon certain terms and conditions as set forth in said report; and that thereafter upon completion of said "grandfather" application a certificate was issued to plaintiff, as the successor in interest to said White companies on December 3, 1941 (Exhibit 6 to complaint). Defendant United States further admits that in a similar proceeding the Interstate Commerce Commission approved the purchase and transfer to the plaintiff of certain operating authority as a motor carrier, held by the partnership of J. H. Frederickson and Son, said transfer and purchase being approved by the order of Division 4, dated November 28, 1944, under terms, conditions and restrictions as set forth in said report and order (Exhibit 7 to complaint).

Defendant United States alleges that on February 5, 1945, the Interstate Commerce Commission, on its own mo-

tion, entered an order reopening for reconsideration on the existing records, the proceedings involved in the said White and Frederickson purchases and in the common carrier application of the plaintiff to determine what conditions, if any appeared necessary, should be imposed to insure that service of the plaintiff is restricted to that which is supplemental of or auxiliary to rail service. The United States further alleges that the report of the Commission on reconsideration was entered March 4, 1946 (Exhibit 8 to Complaint), and that the parties were permitted to file petitions for rehearing, reargument, or reconsideration of the findings in the report of March 4, 1946, and that plaintiff did, on May 27, 1946, file its petition for reconsideration and oral argument; that the Commission entered its report on further reconsideration on April 11, 1949 (Exhibit 9 to Complaint); that the said report of April 11, 1949, states fully the bases on which the findings were entered, to  
 208 the effect that the certificates held by the plaintiff, under its own applications and in the White proceedings, should be conditioned and restricted as stated in five specific restrictions, in order to limit the service of plaintiff to that which is supplemental of or auxiliary to rail service, and that final approval of the authority in the Frederickson proceeding should be so conditioned and restricted. The United States further alleges that on April 11, 1949, the Interstate Commerce Commission entered an order that the certificates issued to the plaintiff under its own applications and as purchased in the White proceedings, be modified as found and directed in said report of the same date, and that an amended certificate be issued to plaintiff in accordance therewith, and that the certificate to be issued plaintiff in the Frederickson proceeding be made to conform to the conditions and restrictions stated in said report; and that said order was made effective May 31, 1949, which said effective date has been further extended by the Commission to now become effective on October 15, 1949.

## VI

The defendant, United States of America, denies that the Interstate Commerce Commission's orders of March 4, 1946 and April 11, 1949, are void or invalid for any reason set forth in the complaint, or for any other reason. Further answering, the defendant United States of America states that the administrative proceedings before the Interstate Commerce Commission were conducted in accordance with

the standards prescribed by Congress and all laws applicable thereto and that said reports and orders of the Commission constitute the lawful action of that Commission. Defendant United States of America further states that said reports and orders were duly made, within the said Commission's constitutional and statutory powers, upon adequate findings, supported by substantial evidence, and were and are in all respects valid and lawful.

209°

## VII

Except as herein expressly admitted, defendant denies each and every allegation in the complaint contained.

WHEREFORE, defendant prays that the relief prayed for by plaintiff be denied and that the complaint be dismissed, plaintiff to pay the costs.

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General*

FREDERICK R. HANLON

Frederick R. Hanlon

*Special Attorney*

HERBERT A. BERGSON

*Assistant Attorney General*

JAMES E. KILDAY

*Special Assistant to the Attorney General*

OTTO KERNER, JR.

*United States Attorney*

In the United States District Court

(Title Omitted)

211     *Designation of Judges—Filed Sept. 14, 1949*

The undersigned Chief Judge of the Court of Appeals for the Seventh Circuit, having been notified by Honorable Michael L. Igoe, a United States District Judge of the Northern District of Illinois, of an application for injunction and other relief in the above entitled cause, does hereby, pursuant to Sec. 2284 of the Revised Judicial Code, designate the Honorable Elwyn R. Shaw, a United States District Judge for the Northern District of Illinois, and the Honorable F. Ryan Duffy, a Circuit Judge of the United States Court of Appeals for the Seventh Circuit, to serve as members of a three-judge district court to hear and determine the above-designated action or proceeding

# MICRO

## TRADE



# 52

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**35**

now set for hearing on September 28, 1949, at 2 p. m., and for such further time as may be required.

Dated this 13th day of September, 1949.

J. EARL MAJOR  
Chief Judge, United States Court  
of Appeals for the Seventh Circuit

213 In the United States District Court  
(Title Omitted)

*Application for Leave to Intervene—Filed Sept. 26, 1949*  
*To the Honorable Judges of Said Court:*

Now COMES intervener Omaha Chamber of Commerce and respectfully shows:

#### I

That the intervener is a non profit organization composed of shippers, manufacturers and wholesalers.

#### II

Intervener presents this application in accordance with Section 2323. Title 28 United States Code, which, among other things, provides:

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

Rule 24 of the Federal Rules of Civil Procedure, among other things, provides:

"(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene."

The intervener was represented in the original proceedings before the Interstate Commerce Commission in M.C.F. 445 The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company Incorporated *et al.*

#### IV

Intervener alleges:

214 First—That said order of the Interstate Commerce Commission concerning No. M.C.F. 445 No. MC-F-2327 and MC 29130—(Formerly MC 49147) dated

April 11, 1949, herein complained of, deprives the complainant of the right as well as the duty imposed upon it by Sections 216 and 217 of Part II of the Interstate Commerce Act of filing, Publishing and maintaining rates and schedules as a common carrier by motor vehicle, as well as the right to enter into joint rates, rates with other motor carriers, and, furthermore, would deny the manufacturers, receivers and shippers of freight located at Omaha, Nebraska, the right to use the Rock Island Motor Transit Company as a common motor carrier to the extent and in the manner contemplated and authorized by the certificate of public convenience and necessity acquired by The Rock Island Motor Transit Company in shipping, routing and receiving freight at Omaha, Nebraska.

Second—That the manufacturers who ship and receive freight via the complainant's line would suffer irreparable loss due to the fact that many common motor carriers do not reach the same destinations when shipping from Omaha, Nebraska.

Third—That economic and competitive conditions today are such that many small communities are relying and depend upon expeditious service in the shipping and receiving of freight such as is being now rendered by the complainant, and that if said order of the Interstate Commerce Commission should become effective it will have a harmful effect on Intervener's members as well as the communities now being served by the complainant.

Fourth—The Interstate Commerce Commission has exceeded its authority in attempting, after it had been finally granted, to alter complainant's certificate, so as to limit the type of service to substantially less than authorized by the original certificate. See Train Lines case, 329 U. S. 424. The certificate held by the complainant is final, and the order herein complained of unlawfully attempts to modify and change it. The Commission therefore has exceeded its power. Smith Bros., 33 MCC, 465.

215 Wherefore, intervener prays—

First. That leave be granted to it to intervene in support of the complainant filed herein, and to appear as a part herein and be represented by counsel.

Second. That upon a final hearing of this cause a permanent injunction shall be issued decreeing that the reports and orders of the Interstate Commerce Commission herein complained of are null and void and are set aside, suspended, and annulled, and that their enforcement, execution, and operation shall forever be enjoined, and that the United States of America shall forever be restrained from

taking any steps or instituting or further prosecuting any proceeding to enforce said orders.

Third. That this court grant to intervenor such other and further relief as may be deemed proper in the premises.

Respectfully submitted,

ROBERT H. HEINECAMP

Robert H. Heinecamp

*Attorney for Intervener*

HENRY E. SASSO

*of Counsel*

77 W. Washington St.

Chicago, Ill.

216

(Title Omitted)

*Notice*

To:

HARRY E. BOE

La Salle Street Station

Chicago, Illinois

MARTIN L. CASSELL

La Salle Street Station

Chicago, Illinois

W. F. PETER

La Salle Street Station

Chicago, Illinois

A. B. ENOCH

La Salle Street Station

Chicago, Illinois

*Counsel for Complainant*

HERBERT A. BERGSON

*Assistant Attorney General*

WILLIAM D. MCFARIANE,

*Special Assistant to the Attorney General*

Department of Justice

Washington, D. C.

OTTO KERNER, JR.

*United States District Attorney*

Chicago, Illinois

DANIEL W. KNOWLTON

*Chief Counsel*

ALLEN CRENSHAW

*Attorney*

Interstate Commerce Commission

Washington, D. C.

Please take notice that on Monday, the 26th day of September, 1949, at 10:00 a. m., the undersigned, attorney for intervener, will appear before the Honorable Judge Igoe, one of the Judges of said Court or such other Judge as may be sitting in his place and stead in the United States Court House in City of Chicago, State of Illinois and present the motion of Omaha Chamber of Commerce together with supporting application to intervene, and ask that the Court enter an order permitting and granting leave to said intervener to intervene herein in accordance with the statute in such case made and provided, and for such other relief as may be just.

217 Dated September 14, 1949.

R. H. HEINECAMP  
R. H. Heinecamp  
*Attorney for Interveners*

Address: 1700 W.O.W. Bldg.  
Omaha Chamber of Commerce  
Omaha, Nebraska  
HENRY E. SASSO  
Chicago, Illinois  
*of Counsel*  
77 W. Washington St.

Received a copy of the above and foregoing notice, together with a copy of motion, application therein referred to.

Dated received  
9/17/49

HARRY E. BOE  
Harry E. Boe

9/17/49.

MARTIN L. CASSELL  
Martin L. Cassell

*Attorneys for Complainants*

9/19/49

HERBERT A. BERGSON  
Herbert A. Bergson

9/19/49

WILLIAM D. McFARLAND  
by Frederick R. Hanlon  
William D. McFarland

*Attorneys for United States of Amer.*

.....  
9/19/49

9/19/49

.....  
Otto Kerner, Jr.

DANIEL W. KNOWLTON  
Daniel W. Knowlton

ALLEN CRENSHAW  
Allen Crenshaw

*Attorneys for the Interstate  
Commerce Commission*

218

(Title Omitted)

Notice

To:

HARRY E. BOE  
La Salle Street Station  
Chicago, Illinois

MARTIN L. CASSELL  
La Salle Street Station  
Chicago, Illinois

W. F. PETER  
La Salle Street Station  
Chicago, Illinois

A. B. ENOCH  
La Salle Street Station  
Chicago, Illinois

*Counsel for Complainant*

HERBERT A. BERGSON  
*Assistant Attorney General*

WILLIAM D. McFARLANE  
*Special Assistant to the Attorney General*  
Department of Justice  
Washington, D. C.

OTTO KERNER, JR.  
*United States District Attorney*  
Chicago, Illinois

DANIEL W. KNOWLTON  
*Chief Counsel*

ALLEN CRENSHAW  
*Attorney*  
Interstate Commerce Commission  
Washington, D. C.

Please take notice that on Monday, the 26th day of September, 1949, at 10:00 a. m., the undersigned, attorney for intervenor, will appear before the Honorable Judge Igoe, one of the Judges of said Court or such other Judge as may be sitting in his place and stead in the United States Court House in City of Chicago, State of Illinois and present the motion of Omaha Chamber of Commerce together with supporting application to intervene, and ask that the Court enter an order permitting and granting leave to said intervenor to intervene herein in accordance with the statute in such case made and provided, and for such other relief as may be just.

219 Dated September 14, 1949.

R. H. HEINECAMP

R. H. Heinecamp

*Attorney for Interveners*

Address: 1700 W. O. W. Bldg.

Omaha Chamber of Commerce  
Omaha, Nebraska

Henry E. Sasso  
Chicago, Illinois  
*of Counsel*

77 W. Washington St.

Received a copy of the above and foregoing notice, together with a copy of motion, application therein referred to, and copy of draft of proposed order.

Date received  
9/19/49

HARRY E. BOE

Harry E. Boe

MARTIN L. CASSELL

Martin L. Cassell

*Attorneys for Complainants*

HERBERT A. BERGSON

WILLIAM D. McFARLAND

*Attorneys for United States of America*

OTTO KERNER, JR. F. N.

Otto Kerner, Jr.

DANIEL W. KNOWLTON

ALLEN CRENSHAW

*Attorneys for the Interstate  
Commerce Commission*

9-20-49

221 In the United States District Court  
(Title Omitted)

*Order Granting Leave to Intervene—Filed Sept. 26, 1949*

On this day coming to be heard the application of the Omaha Chamber of Commerce of Omaha, Nebraska for leave to intervene in this proceeding and the Court being fully advised in the premises, it is

ORDERED that leave be and it is hereby granted to Omaha Chamber of Commerce to intervene herein, to appear as a party herein, and to be represented by counsel.

IGOE  
Judge

223 In the United States District Court  
(Title Omitted)

*Motion for Leave to Intervene—Filed Sept. 26, 1949*

Comes now the State of Iowa by the Iowa State Commerce Commission through its attorney, the Commerce Counsel of Iowa, and respectfully moves this Court for an Order permitting it to intervene herein and making it a party plaintiff herein and permitting it to file its Complaint in Intervention herein. A copy of said Complaint in Intervention is attached hereto.

This Motion is based upon the following grounds:

I

That the Iowa State Commerce Commission is a commission of the State of Iowa that is given general supervision of all motor carriers operating within the State of Iowa. That the Commerce Counsel of Iowa is by statute charged with the duty of appearing for the Iowa State Commerce Commission and for the State and the citizens, communities and industries thereof in all actions instituted in any federal court wherein is involved the validity of any order of the Interstate Commerce Commission affecting the interests of the citizens and industries of the state.

224 - That said Complainant in Intervention is filed on behalf of the State of Iowa and the citizens, communities and industries thereof, all of which have a direct interest in the litigation herein.

## II

That the State of Iowa by the Iowa State Commerce Commission, has a right to intervene in this action under the provisions of Title 28, U. S. C., Section 2323, Rule 24, Federal Rules of Civil Procedure, and the provisions of the Code of Iowa, 1946, Chapters 325, 474 and 475.

## III

The complaint in the above entitled cause of action seeks to have enjoined and annulled an order of the Interstate Commerce Commission dated April 11, 1949, which order by its terms restricts the certificate of convenience and necessity held by the Rock Island Motor Transit Company, complainant, to that which is auxiliary to, or supplemental of, train service of the Chicago, Rock Island and Pacific Railroad Company, and further provides key point restrictions prohibiting transportation of a shipment by the complainant between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport, and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Illinois.

## IV

That the effect of said order of the Interstate Commerce Commission dated April 11, 1949, will be to deprive the Iowa citizens, communities and industries heretofore served under the certificate involved by the Rock Island Motor Transit Company and its predecessors of the regular, dependable motor carrier service heretofore provided

225 by said complainant and its predecessors.

## V

That the curtailment of service to the State of Iowa and the citizens, communities and industries thereof, which will result from the order of the Interstate Commerce Commission, will irrevocably damage the State of Iowa and the citizens, communities and industries thereof that are now being served by the complainant motor carrier, and that the State of Iowa and Iowa citizens, communities and industries have a direct interest in the subject matter of the litigation here involved.

## VI

That said order of the Interstate Commerce Commission was entered without notice to the State of Iowa and its citizens, communities and industries.

## VII

That said order of the Interstate Commerce Commission should be enjoined and annulled for the reason that it was issued in violation of Section 212 of the Interstate Commerce Act; that said order was arbitrary and capricious; that it deprived the State of Iowa, its citizens, communities and industries of motor carrier service; that it was not based upon evidence before the Commission as to the necessity of such service; that it was issued without notice to the State of Iowa, its citizens, communities and industries; that said order would destroy the ability of the complainant to serve the Iowa communities in interstate commerce.

## VIII

That intervention in this case is necessary in order to protect the rights and interests of the State of  
226 Iowa, its citizens, communities and industries.

Respectfully submitted,

ERNEST PORTER

Ernest Porter

*Commerce Counsel of Iowa*

GEORGE COSSON, JR.

George Cosson, Jr.

*Assistant Commerce Counsel*

Address:

State House

Des Moines, Iowa

September 26th, 1949.

227

(Title Omitted)

*Notice*

To:

HARRY E. BOE

La Salle Street Station

Chicago, Illinois

MARTIN L. CASSELL

La Salle Street Station

Chicago, Illinois

W. F. PETER

La Salle Street Station

Chicago, Illinois

A. B. ENOCH  
La Salle Street Station  
Chicago, Illinois  
*Counsel for Complainant*

HERBERT A. BERGSON  
WM. D. McFARLANE  
Department of Justice  
Washington, D. C.

DANIEL W. KNOWLTON  
ALLEN CRENSHAW  
Interstate Commerce Commission  
Washington, D. C.

OTTO KEINER, JR.  
*United States District Attorney*  
Chicago, Illinois

228 Please take notice that on Monday, the 26th day of September, 1949, at 10:00 o'clock a. m., or as soon thereafter as counsel may be heard, the undersigned, attorneys for intervener, will appear before the Honorable Michael L. Igoe, one of the Judges of said Court, or such other Judge as may be sitting in his place and stead, in the United States Court House in the City of Chicago, Illinois, and present said intervener's complaint in intervention, together with supporting motion for leave to intervene, and ask that the Court enter an order permitting and granting leave to said intervener to intervene herein, in accordance with the statute in such case made and provided, and for such other relief as may be just.

Dated September 16, 1949.

ERNEST PORTER  
Ernest Porter  
*Commerce Counsel of Iowa*

GEORGE COSSON, JR.  
George Cosson, Jr.  
*Assistant Commerce Counsel*

Address:  
State House  
Des Moines, Iowa.

Received a copy of the above and foregoing notice, together with a copy of intervener's complaint in interven-

tion, motion for leave to intervene therein referred to, and copy of draft of proposed order.

Date received  
Sept. 16/49

HARRY E. BOE  
Harry E. Boe

MARTIN L. CASSELL  
Martin L. Cassell

W. F. PETER  
W. F. Peter

A. B. ENOCH  
A. B. Enoch

*Attorneys for Complainant*

229

Date received  
9/19/49

HERBERT A. BERGSON  
by FREDERICK R. HANLON

9/19/49

WILLIAM D. McFARLANE  
by FREDERICK R. HANLON  
*Attorneys for United States of America*

9/19/49  
9/19/49

DANIEL W. KNOWLTON  
ALLEN CRENSHAW  
*Attorneys for Interstate  
Commerce Commission*

231 In the United States District Court  
(Title Omitted)

*Complaint in Intervention—Filed September 26, 1949*

• • •

The State of Iowa by the Iowa State Commerce Commission pursuant to leave heretofore granted by Order of this Court, as intervener interested in the subject matter of this suit, states to the Court as follows:

# I

That the Iowa State Commerce Commission is a commission of the State of Iowa created by the provisions of law found in Chapter 474, Code of Iowa, 1946. That by the provisions of Chapter 474 and Chapter 325 of the Code of Iowa, 1946, the Iowa State Commerce Commission is given general supervision over all railroads, express companies, freight and freight line companies, common carriers by

motor vehicle and other related subjects. By statute the Iowa State Commerce Commission is commanded to exercise constant diligence to ascertain the rates, charges, rules and practices of common carriers operating in the state in relation to the transportation of interstate business and to intervene in any proceeding pending before the Interstate Commerce Commission wherein the interest of the citizens, communities and industries of the state of Iowa are affected.

That the Commerce Counsel of Iowa, attorney herein for intervenor, is an appointive office established by the provisions of law found in Chapter 475, Code of Iowa, 1946. That by the provisions of Section 474.7 of the Code the Commerce Counsel shall act as attorney for the Iowa State Commerce Commission, and, in addition to other duties, shall appear for the State Commission and for the State and the citizens and industries thereof in all actions instituted in any federal court wherein is involved the validity of any rule, order or regulation of the Interstate Commerce Commission affecting the interests of the citizens and industries of the state.

Intervenor files this petition on behalf of the State of Iowa and the citizens, communities and industries thereof, and alleges that the State of Iowa, and the citizens, communities and industries thereof are directly interested in the litigation herein.

## II.

This complaint in intervention is filed pursuant to the provisions of Title 28, U.S.C., Section 2323.

## III.

The complaint heretofore filed in this cause by the Rock Island Motor Transit Company seeks to enjoin and annul the order of the Interstate Commerce Commission dated April 11, 1949, in Dockets No. MC-F-445, No. MC-F-2327, and No. MC-29130 on the grounds that:

1. Said order deprives the complainant of its property without due process of law in violation of the Fifth Amendment to the Federal Constitution.

2. Said order was beyond the jurisdiction of the Interstate Commerce Commission and contrary to the provisions of the Interstate Commerce Act.

3. Said order was arbitrary, capricious, unreasonable and not based upon any evidence.

The complaint of the Rock Island Motor Transit Company, complainant herein, is by this reference made a part hereof.

That said order of the Interstate Commerce Commission dated April 11, 1949, provided, among other things, that the certificate previously issued to the Rock Island Motor Transit Company should be modified so as to require that all future operations thereunder be conducted subject to the following conditions and restrictions:

A. The service to be performed by the Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of the Chicago, Rock Island and Pacific Railroad Company.

B. No shipment shall be transported by the Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Ill.

#### IV.

That the effect of said order of the Interstate Commerce Commission dated April 11, 1949, will be to deprive the Iowa citizens, communities and industries heretofore served under the certificate involved by the Rock Island Motor Transit Company and its predecessors of the regular, dependable motor carrier service heretofore provided by said complainant and its predecessors.

That the Iowa citizen, communities and industries affected by said order of the Interstate Commerce Commission are generally those located on or adjacent to U. S. Highway 6 between the Iowa cities of Davenport and Council Bluffs. That more particularly the following Iowa cities and towns will be deprived of, or have curtailed, the regular, dependable motor carrier service heretofore provided by the complainant:

Grinnell	Marengo	Walcott
Durant	Atalissa	Victor
Iowa City	Brooklyn	Wilton
Ladora	Menlo	Council Bluffs
West Liberty	Kellogg	Homestead
Adair	Harlan	Minden
Davenport	Des Moines	Atlantic
Newton	Dexter	Colfax
Cedar Rapids	Muscatine	Altoona
Mitchellville	Malcolm	Carnsforth
Oxford	Tiffin	Moscow
Stockton	Redfield	Stuart
Casey	Anita	Wiota
Lewis	Oakland	

That by the provisions of said order it will be impossible and unlawful for the above listed Iowa cities and towns to ship or receive over the lines of the complainant interline motor freight, that is freight which is carried by other motor carriers. Intervener alleges that although certain of the communities listed above are served by other motor carriers, that such service as to most of said communities, excepting the larger cities and towns of Davenport, West Liberty, Iowa City, Grinnell, Newton, Des Moines, Atlantic and Council Bluffs, is for truckload lots and that such communities do not have daily motor carrier service for less-than-truckload freight or merchandise excepting, however, the service of the complainant, and that there is not sufficient traffic available to other motor carriers to operate daily except Sunday motor carrier service to the smaller communities for the reason that such service would not be economically justified. That in particular the carriers presently holding certificates of convenience and necessity authorizing such service in interstate commerce cannot and will not render a satisfactory motor carrier service to and from the following communities located on or adjacent to U. S. Highway 6, to wit:

Walcott	Stockton	Durant
Wilton	Moscow	Atalissa
Tiffin	Oxford	Homestead
Marengo	Ladora	Victor
Cransforth	Brooklyn	Malcom
Kellogg	Colfax	Mitchellville
Altoona	Dexter	Stuart
Casey	Adair	Anita
Wiota	Lewis	Oakland

That the restrictions imposed upon the complainant by said order of April 11, 1949, will result in curtailment of service offered to the Iowa communities now served by the Rock Island Motor Transit Company for the reason that the decrease in the volume of business handled by the complainant will not leave a sufficient volume to justify the maintenance of the present operations. The restrictions imposed by said order will impair the financial ability of the complainant to render dependable motor carrier service now provided to the State of Iowa and the citizens, communities and industries thereof.

That the curtailment of service to the State of Iowa and the citizens, communities and industries thereof which will

result from the order of the Interstate Commerce Commission will irrevocably damage the State of Iowa and the citizens, communities and industries thereof that are now being served by the complainant motor carrier, and that the State of Iowa and the Iowa citizens, communities and industries have a direct interest in the subject matter of the litigation here involved.

That said order of the Interstate Commerce Commission was entered without notice to the State of Iowa and its citizens, communities and industries.

## V

That said order of the Interstate Commerce Commission should be enjoined, annulled and set aside for each and all of the following reasons, to wit:

236 A. The order of April 11, 1949, was issued in violation of Section 212 of the Interstate Commerce Act in that the Interstate Commerce Commission may only amend or revoke in whole or in part a certificate of convenience and necessity after notice and hearing for failure to comply with the provisions of Part II of the Interstate Commerce Act or with any lawful order, rule or regulation of the Commission promulgated thereunder.

B. That said order is arbitrary and capricious in that it deprives the State of Iowa and its citizens, communities and industries of motor carrier service; that said order was not based upon any evidence or showing before the Commission as to the necessity of such service.

C. That said order depriving the State of Iowa and its citizens, communities and industries of motor carrier service was without notice to the State of Iowa, its citizens, communities and industries.

D. The order of April 11, 1949, prohibits transportation by Rock Island Motor Transit Company between Davenport, Bettendorf, Cedar Rapids, Muscatine, Des Moines and all other points east of Des Moines in Iowa, on the one hand, and Omaha, Nebraska, on the other. Such order does not and will not accomplish the stated purpose of confining the service to be rendered by Rock Island Motor Transit Company under its certificates to service which is supplementary and auxiliary to the rail service of Chicago, Rock Island and Pacific Railroad Company, but in fact prohibits transportation between the points specified and destroys the ability of

Rock Island Motor Transit Company to serve the communities hereinbefore referred to in interstate commerce even with respect to transportation of shipments moving on railroad billing and at railroad rates. That said order will require that shipments between the points referred to in this paragraph be made partly by railroad and partly by  
 237 truck which is impractical, and the necessary effect of said order will be to practically prohibit Rock Island Motor Transit Company from rendering service of value to the communities designated in interstate commerce.

#### PRAYER

WHEREFORE, Intervener prays for the same relief as requested in the Prayer of complainant's complaint as follows:

FIRST. That upon the filing of this complaint, the Judge of this Court shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge;

SECOND. That process may issue against the defendants United States of America and the Interstate Commerce Commission;

THIRD. That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and a temporary stay or suspension of said order of the Interstate Commerce Commission of April 11, 1949, pending hearing and determination of complainant's application for interlocutory and permanent injunctions, be issued;

FOURTH. That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and an interlocutory injunction be issued, staying and suspending the said report and order of the Interstate Commerce Commission.

FIFTH. That upon final hearing of this cause, a permanent injunction shall be issued, decreeing that reports and orders of the Interstate Commerce Commission herein  
 238 complained of are null and void and are set aside, suspended and annulled, and that their enforcement, execution and operation shall forever be enjoined, and that the United States of America shall forever be restrained from taking any steps or instituting or further prosecuting any proceeding to enforce the said orders.

SIXTH. That this Court grant to the complainant such other and further relief as by it may be deemed proper in the premises.

Respectfully submitted,

ERNEST PORTER

Ernest Porter

*Commerce Counsel of Iowa*

GEORGE COSSON, JR.

George Cosson, Jr.

*Assistant Commerce Counsel.*

Address:

State House  
Des Moines, Iowa.

September 26th, 1949.

240 In the United States District Court  
(Title Omitted)

*Order Granting Leave to Intervene—Filed Sept. 26, 1949*

On this day coming on to be heard the Motion for Leave to Intervene of the State of Iowa, *ex rel* Iowa State Commerce Commission in this proceeding and the Court being fully advised in the premises, it is

ORDERED that the State of Iowa by the Iowa State Commerce Commission be and is hereby granted leave to intervene in this cause and to appear as an intervening complainant herein.

IGOE  
*Judge*

242 In the District Court of the United States  
For the Northern District of Illinois  
Eastern Division

THE ROCK ISLAND MOTOR TRANSIT COMPANY, COMPLAINANT,  
VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS.

Civil Action No. 49 C 1005.

*Transcript of Proceedings—Filed Feb. 3, 1950*

had in the above-entitled cause on September 28, 1949, before Circuit Court of Appeals Judge Duffy, District Judge

Shaw and District Judge Igoe., in Chicago, Illinois, at the hour of 10:00 o'clock, a. m., in the room usually occupied by Judge Igoe.

243

## APPEARANCES:

Mr. Harry E. Boe, appeared for the Complainant;  
Mr. Allen Crenshaw, Assistant Chief Counsel, Interstate Commerce Commission.

Mr. William D. McFarlane, Special Assistant to the Attorney General.

Mr. H. H. Heinecampe, appeared for Omaha Chamber of Commerce.

Mr. Henry E. Sasso, appeared for the State of Iowa.

Mr. George Cosson, Jr., appeared for the State of Iowa.

244 The CLERK: Case No. 49 C 1005, The Rock Island Motor Transit Company versus the United States of America and Interstate Commerce Commission.

Mr. BOE: The plaintiff is ready.

Judge IGOE: Does the Reporter have all the appearances?

Mr. BOE: Yes, your Honor.

Mr. HANDELMAN: The Government will be represented by Mr. McFarland from the Washington Office, and the Interstate Commerce Commission by Mr. Crenshaw, who asked to be recognized here for the purposes of this trial.

Judge DUFFY: We are very happy to have them out here with us.

Whereupon the Complainant to Maintain the Issues Upon its Part Introduced the Following Evidence and Arguments, to-wit:

Mr. BOE: If the Court please, my name is Harry E. Boe. I represent the plaintiff. My associate is Mr. Martin L. Cassell, for the complainants.

If the Court please, I have prepared some maps that are enlarged maps of Exhibit 1, attached to our complaint. I also have some extra copies of the complaint if the Court would care to have them.

245 Judge SHAW: Maybe we had better have those.

Mr. BOE: I would also like to hand to the Court the memorandum brief to supplement our presentation here today.

I also have extra copies of the petition for reconsideration and oral argument which was filed with the Commission and which is incorporated in the record, a certified copy of which I will offer in my presentation.

I have two copies of the Interstate Commerce Act which contains the pertinent sections of the law which we regard as applicable, for the Court's convenience.

Judge SHAW: Are these set up in briefs?

Mr. BOE: They are. I didn't know whether in the course of this argument the Court might want to refer to certain sections of the law, which I might refer to.

If I may be permitted, at the outset, to make a brief statement of the nature of this controversy, I think that will disclose it in a general way.

Judge DUFFY: Suppose you tell us just exactly what you are asking for here today?

Mr. BOE: We are asking this Court to set aside and enjoin the order of the Interstate Commerce Commission entered on April 11, 1949.

Judge DUFFY: I guess I did not make myself understood. What I want to get at is are you just asking for an interlocutory injunction today or do you appear now submitting the matter on the merits, on which the Court will finally determine the question?

Mr. BOE: I am ready to submit it on the merits today. I have on file, I may say, a motion for temporary relief, a restraining order, restraining this order that is under attack, which was issued April 11, 1949, and became effective May 31, 1949, which requires us to materially and radically change our method of operation and which would cause an impact on our operations if we are obliged to comply with it.

In that situation and knowing it would disorganize a situation that has prevailed for eleven years, we sought a temporary restraining order.

Judge DUFFY: There is a clear distinction, is there not, between a restraining order and a temporary injunction?

Mr. BOE: I think there is.

Judge DUFFY: Well, what you want is a temporary injunction or restraining order.

Mr. BOE: I think the Court must be asked to issue a temporary restraining order pending the determination of the issues involved here, but I think we can by-pass the temporary injunction, I think the judicial procedure provides for such a proceeding.

Judge DUFFY: Do you agree to that?

Mr. CRENshaw: I may say I think I can alleviate all the distress, representing the Commission. The Commission has already extended the effective date of the order to October 15th. That was done to give the Court sufficient

time to decide the case. If that is not sufficient time to give the Court that opportunity, I will undertake to have it further extended and thereby avoid the necessity for any temporary injunction.

Mr. BOE: That is satisfactory to me and all I ask at this time is merely that the motion for a temporary restraining order be continued for the time being.

Mr. CRENSHAW: I may say that the attitude of the Commission since the bringing of this case, and we have never had any other, was to consider the Court's convenience and we do that in every case wherever it is possible.

Judge IGOE: That is the usual practice, isn't it?

Mr. CRENSHAW: Yes, your Honor.

Judge DUFFY: It is understood there will be no  
248 attempt to enforce the order until the merits are passed on; the record now stands there will be no attempt made to enforce the order until this case terminates.

Mr. CRENSHAW: It cannot be enforced until it is and in twenty-four hours I can arrange to extend it again if I have to do that.

Judge SHAW: The Court can do it in less than twenty-four seconds, can't it?

Judge DUFFY: I think there is no dispute about it, it may be understood by stipulation the Commission agrees on its part there will be no attempt to make this order effective until this Court has opportunity and does pass upon the merits of the controversy.

Mr. CRENSHAW: That is the purpose of my statement, your Honor.

Mr. BOE: This record we will read here today. I think, and the order which is attacked at this time, will show conclusively, I submit, a flagrant departure from the administrative processes which the Interstate Commerce Commission may exercise, under its statutory powers.

Specifically, we allege that this order, and may I interpolate that all of the relevant orders are incorpo-  
249 rated as exhibits to our complaint and I would like to refer to them later on—specifically we charge that the action of the Commission reflected by the order of April 11, 1949, exceeds the Commission's statutory jurisdiction and powers.

It unlawfully imposes restrictions upon certificates duly and lawfully acquired by the plaintiff, the rights have been originally established as grandfather rights, and I will

explain that matter shortly, by reason of operations which existed on or before June 1, 1935, and continuously thereafter, covered by Section 206-A of the Motor Carrier Act of August 9, 1945.

It amounts, the order amounts to a direct revocation of a portion of our certificate in a manner not authorized by Section 212 of the Interstate Commerce Act.

This is accomplished by changing the policy or meaning of the term "auxilliary to or supplemental of rail service," and I should mention that the plaintiff is an affiliated corporation of the Chicago, Rock Island & Pacific Railroad.

Incidentally, these rights were acquired, as the application will show, our authority to operate as we have was acquired and authorized by an order of this Court, The  
250 United States District Court of this District in re-organization proceedings brought under Section 77 of the Bankruptcy Act.

That order of authority is incorporated as an exhibit to the application filed with the Interstate Commerce Commission.

In other words, this Court authorized the Trustees of the Chicago, Rock Island & Pacific Railroad Company to acquire the rights that are in dispute at this time.

There are two routes that are involved, two separate operations: one is the White Line Route which I will refer to as White Line Route for abbreviation and that is shown on Exhibit 1, which is a map in the Appendix of our Complaint; the Yellow Line between Sylvis and Omaha, Sylvis, Illinois, on the east and Omaha on the west, is the critical line involved in this dispute. The line in green—

Judge DUFFY: What about the grandfather right? The late grandfather right, is that involved here?

Mr. BOE: That is not involved in this order. The route involved is from Sylvis to Omaha. The line in green on the west is the so-called Frederickson Route. The Fredericksons were partners from whom we acquired the rights represented by the Green Line.

251 The White Line rights were acquired under authority of the order of the Commission dated April 1st, 1938, eleven years ago, over eleven years ago, in proceedings under the Commission's Docket MC-F-445 that is mentioned in the order of re-opening the matter.

The Frederickson Lines were acquired in the latter part of 1943; both of the certificates were issued to the predecessors in interest, the White Line Company and the

Fredericksons under grandfather rights established pursuant to Section 206-A.

Now, in respect to grandfather rights, as they grew up after the passage of the Motor Carrier Act in 1935, that refers to fixed rights that were recognized by Section 206-A, as being authorized on a showing that was an operation, a bona fide operation, in existence on June 1st, 1935 and continuously thereafter, and upon taking the technical step of filing application for grandfather rights the certificate shall be issued.

It is mandatory upon the Commission to issue a certificate under those circumstances. That is all covered by the provisions in Section 206-A.

The late grandfather route is a term that is used, I think, more or less on these papers and records, and that has reference to operations started after June 1st, 1935, but which were in effect on August 9, 1935, with an interval of a month or two between that date and the date which was the effective date of the Motor Carrier Act, August 9, 1935.

Now, our contract with the White Line contemplated the acquisition of rights, all the rights that the White Line had between Chicago and Omaha. It so happened that the route between Chicago and Sylvis was of the late grandfather type and that was a subsidiary or ancillary proceeding and is not involved or covered by the order of April 11, 1945—1949, and I think may be disregarded in the consideration of our complaint.

The White Line at the time we entered into the deal also claimed rights from Chicago to points in Upper Michigan and I mention what the Commission said in the Barker case, which is referred to so extensively in the Commission's orders of March 4, 1946 and April 11, 1949, and being interested only in limiting the operations of the plaintiff to points located on rail lines of the parent company, "Our transactions did not include the rights the White Line claimed between Chicago and points in Michigan," and they were traded off to some other company and are not involved in the certificate that we obtained from the White Line pursuant to the order of April 1, 1938, restating that our certificate would be amended to limit the operating rights to those applicable to the routes between Chicago and Omaha.

Now, the White Line was not affiliated with a railroad, nor was Frederickson, so the Commission granted operating rights, franchise rights and rights of certificates of a

motor carrier, a common motor carrier, not affiliated with a railroad, and it is those rights that are affected by the orders in Sections 213 and 52 in proceedings which are now re-opened by the order of April 11, 1949, wherein the Commission used the term in its conditions that the Commission reserved the right to impose additional conditions to insure that the service should be auxiliary to or supplemental to the service of the railroad company and that is the controversial point here, as to what the meaning of that term was.

The Commission, in its present order, points elaborately to what it said in the Barker case.

The Barker case is reported at, the first proceeding is reported in Volume 1 of the Motor Carrier Reports, Page 101, Pennsylvania Truck Lines—Pennsylvania Truck Lines were a subsidiary of the Pennsylvania Railroad. It was considered further in a subsequent proceeding under the same docket number in Volume V of the Motor Carrier Reports at Page 9.

The decision of the Commission in the White Line case authorizing our acquisition and purchase is reported also in Volume V of the Motor Carrier Reports at 451.

Judge DUFFY: In the Barker case was there any reservation in the certificates with a provision such as there was in this case?

Mr. BOE: Yes, it was reserved that the service should be auxiliary and supplemental to the rail service.

Now, the condition that chiefly causes the crippling of our carrier rights is the condition that the service shall be strictly and definitely limited—and these are the terms of the order entered by the Commission—operations supplemental and auxiliary to the operations of the railroad.

Then in March, 1946, eight years after we acquired the rights, spent \$50,000 and spent \$300,000 building up the rights and building up a business that represents over a million dollars a year in revenue, they enter an order that they say means we may not engage in what they call all motor service.

255 Now, motor service is service that is rendered strictly under Part 2 of the Motor Carrier Act of the Interstate Commerce Act and it would mean they require us to cancel our motor carrier tariffs that we filed back in 1938, under instructions of this Commission and since that time they were continuously in effect and in effect today, they have been in effect for over eleven years

before we were put on official notice that we were doing something they felt was unlawful.

In other words, they changed their policy as to the meaning of that term in 1946, and they say in their order under attack here that they spell out—that is their terminology—the meaning of auxiliary to and supplemental of, as they spelled it out in the Texas Pacific case which is reported in Volume 41, 721.

I have copies of that report, it is in the bound volumes but I would like to refer you to the language of the order of April 11, 1949, where they work that terminology into this case. At Page 127 in the Appendix of the complaint they use this language:

“It is true that subsequent to the Barker and Kansas City Southern cases the meaning of the term ‘auxiliary to and supplementary of’ was spelled out in greater detail in Texas and Pacific”—  
and so on.

Now that is the critical language upon which they base their authority to modify our rights.

Now I want to get back to the Barker case because they rely on the Barker case, so generously quoted, as the basis for what they hold here.

The Barker case—

Judge SHAW: Was that in the Commission's report or the Federal Court report?

Mr. BOE: That is the Commission report. I am referring to their discussion in 5-MCC-481, that is the Pennsylvania Truck Lines, regarding the acquisition of the Barker lines.

Now Barker was not affiliated with any railroad and here the Commission is talking about approved and disapproved operations, and if you can get anything out of their report of this it is that it is a territorial limitation the Commission was concerned in carrying out, and defining the policy in the Motor Carrier Act of confining the motor operations, such as they may be, to the territory of the affiliated rail line, as Barker  
257 had some routes that extended beyond Pennsylvania Railroad territory. Those routes the Commission indicated would not be authorized and they said they would have to limit their operations to stations on the Pennsylvania Railroad where the service could be auxiliary; that the service to be auxiliary would have to be rendered in connection with the rail operations.

That is true, but they didn't say exclusively; Barker had wide open rights and those are the rights the Commission in the Barker case authorized the Pennsylvania Truck Lines to acquire.

Now, they said in their report and order here under attack and in the one re-opening the case on the present record, not on any new evidence that has come to the Commission, there is not a scintilla of evidence that the conditions have changed from 1938 to 1946, when they re-opened the case, nothing new, re-opened on the old record and in the original record it is proven what we got. They re-opened on the same record and then decided what we got has to be cut down in such shape we have got to get out of joining in and maintaining rates with other motor carriers, interchanging with other carriers, cutting away half of our business.

Now the Commission says they spelled it out in 258 the Barker case, they say it so many times, and devote so many pages to it I hope your Honors will be careful and I know that you will be, to catch the profuse quotations that embody or use the exact language the Commission used in our case, they used in the Barker case, and that there is page after page here that is in the Barker case language, which is made the language of the report in this case.

I can refer to so many pages here that show that, starting at Page 68 in our Appendix, 70, 71, 72, 73, 74, and then again the same with the Kansas City Southern Lines, many pages here that are almost the same as if it was the language used in this case, and it was used in those other cases.

They followed a course of conduct there, in addition to authorizing these acquisitions they followed a course of conduct there that put the stamp of recognizing the validity of our interpretation of that term of "auxiliary to and supplemental of." Then we come down to 1948.

Judge DUFFY: Weren't any of these cases reviewed in Court, the Barker case or the Kansas City Southern case, settling the rule as it applies to the Commission?

Isn't the Commission bound by *Stari decisis*?

259 Mr. BOE: No, sir, I know of no such review and I think the Commission itself will repudiate it; in my appearances before the Commission I have heard that matter discussed and I don't think they regard themselves as bound by that doctrine.

But we spent our money on the sanction and interpretation of that rule by the Commission in 1938 and acquiesced in by them for a period of eight years.

What construction did they place on it in the Barker case in 1938? In the Barker case, that is the supplemental proceeding considering further the Pennsylvania Truck Line rights in Docket MC-2901, Sub No. 34, decided on January 6, 1948, affirming what they said in our case in 1938, and again in 1946, as to what the Barker case meant, and I will stand on what they said in 1948 in their own Barker case.

Under the certificate that Barker had, under the Barker certificates they said, "The applicant performs two distinct types of service, one a substitute service for the railroad." Now they do that for us. We do that, too, and also perform an independent motor service carrier for the general public and that is what they say we may not do now. But they say we may not do it on the strength of what they said in the Barker case back in 1937.

Now I show you that in 1948 they themselves have said "They also perform an independent motor carrier service for the general public and a shipper service providing transportation for general commodities in any quantity on motor carrier bills of lading and tariffs, at motor carrier rates." That is what we are doing and that is what we are asking the Court here to say was right and to say that the Commission is now wrong in compelling us to get out of that second category of business.

In 1948 that is their own interpretation of that Barker case.

Now that is reported—the Commission has in the last few years adopted the practice of not reporting in full their official reports, some of them, this happens to be one of that class; it is referred to in the bound Volume 47, Motor Carrier Reports, at 837, and I have an official copy here that I will be glad to leave with the Court if the Court wants to have access to it.

Judge SHAW: What difference does that make now, what they may have said in earlier times in the Barker case? What they are saying now in this case will determine whether they are authorized by law to take this action. They are not bound by the doctrine of *Stare decisis*. You say that we have to confine ourselves to finding out if they had a right to make the order they did and make the reservation they did.

Mr. BOE: I mean that they may not lawfully change our substantive rights.

Judge SHAW: I am more interested in knowing what the cases have said about it. Do you have any such cases?

Mr. BOE: Yes, I have and I am relying very strongly on what the Supreme Court said very recently in the Seatrain decision, that is 329, United States Report 424, decided January 26, 1947.

Judge SHAW: That is cited in your brief?

Mr. BOE: That is cited in the brief and discussed in the brief.

Now the Lower Court's opinion, in the Lower Court, 64 Fed. Sup. 156, the Lower Court decided that the Commission had gone beyond its statutory powers in changing rights of the Seatrain Company which had valid shipping rights, such as we have. Now, the Seatrain Company was a motor carrier—

Judge DUFFY: Motor or water carrier?

Mr. BOE: Pardon me, water carrier, under Part 3 of the Act. The Interstate Commerce Act.  
262 That was divided into several parts, Part 1 related to rail, Part 2 to water and I think there is one relating to forwarders.

The Supreme Court in the Seatrain case upheld the Lower Court's decision.

Judge SHAW: Is there any distinction between Part 2 and Part 3 of the Act?

Mr. BOE: I think in our case that it is even stronger because the Supreme Court recognized there was some difference, and that the Commission was trying to justify its action in changing the certificate of the Seatrain Company, cutting down its operating authority under the powers the Commission had granted.

Judge SHAW: I think I should direct your attention to the briefs. On Page 111 stating the opinion of the Commission in the Seatrain case which they cited as the 293 U.S., and this should be the 329 U.S., Page 424—

Mr. BOE: That is right. That is an error of the Commission. We have rectified it; that it is not a mistake we made, we have made others; what we have reproduced in this Appendix is a literal reproduction of the orders under attack, so that citation appears in the original order of the Commission.

Judge SHAW: It is cited nowhere else in your brief.  
263 Mr. BOE: I think the text of our complaint and brief takes care of that.

Judge SHAW: I have not seen your brief yet.

Mr. BOE: Page 21—I don't know if we recite it in the body of the complaint itself, the Seatrain case, but we have

reproduced what we think are the pertinent orders of the Commission including the orders which were re-opened, the order re-opening the one that is here under attack, affirming the order it re-opened.

I want to say in passing, in connection with this order of April 11, 1949, and March 4, 1946, there was a dissent, I think Commissioner Miller dissented and Commissioners Mahaffie and Porter joined Commissioner Miller in dissent, and Commissioner Porter died shortly after that order directing the re-opening—

Judge SHAW: I have forgotten how many sit on it. You said three Commissioners dissented, how many others were there?

Mr. BOE: The Commission is composed of eleven members.

Judge SHAW: Did they all work on this?

Mr. BOE: Commissioners Patterson and Alldredge joined in the result, meaning they do not accept all the language used by the Commission in its order, and we find Commissioner Lee and Commissioner Rogers, who joined  
264 with the majority, themselves in other cases, including cases involving the late grandfather rights, and discussing it, urged that the term "auxiliary to and supplemental of" does not enjoin the publication of motor rates and we quote their dissents in those other cases and their views in the other cases which are directly at variance with the language used by the Commission in this present report.

So really you have about five, maybe six, of the Commissioners agreeing with this language and about five or six disagreeing with it, it is almost an even division.

Judge SHAW: Commissioner Mahaffie and Porter dissented.

Mr. BOE: Commissioner Mitchell succeeded Commissioner Porter and on succeeding Commissioner Porter, Commissioner Mitchell joined in the dissent, and you will find the opinion of Commissioner Miller in which he voices dissent, it is incorporated in the order under attack, has been predominately the work of four Commissioners, Commissioner Miller and Commissioner Mitchell who succeeded Porter, and Commissioner Miller who wrote the dissenting opinion himself, and I call attention to the full text of Commissioner Miller's dissent in 1946 when he used language stronger than I am using today in condemning the order of  
265 the majority and he regards it as unfair to revoke the approval of something that happened eight years after we bought this property, and after spending

over \$59,000 purchase price and over \$300,000 in developing the business then we find we did not have what we thought we had.

Judge DUFFY: What did you think you had?

Mr. BOE: We thought we had what the Commission said in the Barker case in 1938 that they affirmed. We thought we had a right to publish motor carrier rates and do an all-out motor carrier business in connection with this type of service, and to substantiate the correctness of our interpretation, as this record will show, the Commission itself required us to adopt the other lines' rates.

Now the only rates that the White Line published were motor rates, no rail rates, those are two different rates, two different things entirely and they required us to do the very thing as a condition precedent to consummation what they now say we have no right to do.

Judge DUFFY: The Act requires you to publish rates and have them approved, does it not?

Mr. BOE: Yes, it does.

Judge DUFFY: Do you do that?

266 Mr. BOE: Yes, that is not challenged, and if these rates were not discriminatory at that time, they could not come in and say that they may be discriminatory now because that would immediately apply to the rates employed by one hundred and one common carriers by motor vehicle.

In that connection I would like to refer the Court to Section 6 which covers the publication of rail rates, Sections 216 and 217 cover the publication of motor rates, the type of rates they say we may not publish.

I want to call your Honors' attention to the provisions of Section 216 at the bottom of Page 131 of the pamphlet copy of the Act I am handing you, sub-paragraph (b):

"It shall be the duty of every common carrier of property by motor vehicle,"

And that is what we are,

"to establish, observe and enforce just and reasonable rates, charges, and classifications,"

267 "Common carriers by motor vehicle of property may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad."

And if this order becomes effective we cannot take the benefit of this statutory permission.

Common motor carriers may do it as we did from the outset, and the Commission never challenged that, after they had given this permission, until in 1946.

Judge DUFFY: Is there any question about the rates before us?

Mr. BOE: No, the only question is the right to publish those rates, not the reasonableness of the rates themselves, it is merely the statutory right to publish those rates.

We may enter into joint rates and practices under Paragraph C with other motor carriers; the Commission now says we cannot do it and can impose upon us the restriction of keeping to the rates quoted by the parent company.

That is the real injury to the plaintiff and to effectuate that restriction, that drastic restriction, they interpose what they call key points, under the authority perhaps of the Barker case.

The key points were not invented by the Commission until 1941 or after. They did not put it in in 1937 in the Banks case. Now, by the key-point limitation the line between Davenport and Omaha is chopped up into three segments of motor routes.

The findings and conditions at the conclusion of the report on further hearing provide—and this is very difficult language to follow—in the findings, pages 147 and 148 of the Appendix:

“No shipments shall be transported by the Rock Island Motor Transit Company—”

That is this plaintiff—

“—between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebraska, Des Moines, Iowa and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Illinois.”

At the present time we are hauling freight from Chicago to Omaha by truck; that was a right the White Line had and that is a right we acquired and that is the right that Commissioner Rogers in the dissent made by him recognized we had a right to do.

Now they revoke that right by imposing this key point restriction. That is the point of our complaint.

Judge IGOE: How can they amend the statute by an order?

Mr. BOE: Well, if you follow this language, Judge—

Judge IGOE: I am trying to follow it.

Mr. BOE: We may not contract to do that under this order? They say we may not—

“No shipments shall be transported by the Rock Island Motor Transit Company between any of the following points \* \* \*”

If we cannot take a shipment from Rock Island to Des Moines, we cannot take it from Chicago to Des Moines.

Judge IGOE: You can take it from an intermediate point?

Mr. BOE: We can take it from a point short of Rock Island to Des Moines.

Judge IGOE: Can you take it from Council Bluffs to Omaha?

Mr. BOE: We can take it from Council Bluffs to Omaha, but not at motor rates, under their finding we cannot do that by motor rates and by applying rail rates would be the only way we can handle it, by rail rates over this chopped up route.

Judge DUFFY: Are rail rates higher?

Mr. BOE: It is true, generally speaking, rail freight rates have been higher, but since we acquired these lines  
270 it appears truck rates have been higher in some cases and in some other cases they are cheaper. We have our traffic man here. I wanted to ask that question of him from the stand, and as I said, I would like to introduce some evidence to show the Court the course of conduct, the taking of property, that will take me forty-five minutes.

Judge IGOE: We will have to agree then to use this time advantageously, we have to finish this case by this afternoon.

Judge DUFFY: You say you have oral testimony to offer, on what question? Will it go over forty-five minutes?

Mr. BOE: That we were required to publish the motor rates condemned in this transcript, which I want to offer, and the record of proceedings before the Interstate Commerce Commission, and I have a summary of that which I will hand up to your Honors, and that may dispense with the necessity of this individual's testimony.

Judge SHAW: Are those questions material if the Commission had power to enter the order?

Mr. BOE: No, I would say not.

Judge SHAW: The first question is the power of the Commerce Commission to enter the order?

Mr. BOE: That is right.

271 Judge SHAW: That is a question of law.

Mr. BOE: That is a question of law.

Judge SHAW: What authority to inquire into this Act do we have?

Mr. BOE: You have authority to inquire into the facts showing the violation of the powers of the Commission. I mean the violation by the Commission of its statutory powers; I am not asking you to inquire into the administrative processes of the Commission.

I will concede that the Commission under the Act has the right to take evidence and to pass generally on the legality of the transaction, that power is specifically conferred, but when these cases come before your Honors, you may hear evidence as to the nature of the injury which is being worked upon us.

Judge DUFFY: Is that power conferred upon this Court by statute?

Mr. BOE: I think it is conferred upon you, it is recognized in the Seatrain case, there is no question about it and I have the authorities here on that point.

Judge SHAW: Is there any dispute about the effect it would have on the earnings and operations of the plaintiff?

272 Mr. BOE: If there is none, as alleged in our bill, I will waive the calling of this witness.

Mr. CRENSHAW: What do you mean, meaning the question of law?

Mr. BOE: Yes.

Mr. CRENSHAW: Leaving the question of law, we would admit they would lose some money if the order was enforced over what they are now getting.

Judge SHAW: They would lose money?

Mr. CRENSHAW: Yes, that would be in the nature of damage.

Judge SHAW: Lost property rights aren't the measure of damage?

Mr. CRENSHAW: We say of course it is not the result of the commission's order that it is not the act of the Commission that is causing damage.

Judge SHAW: We would have to assess damages, you feel?

Mr. CRENSHAW: Only for the purposes of the injunction, and we will admit nothing, we will leave it to the Court and the question of assessing damages has no place as far as this record is concerned; if that were in this case, if we could not take it out, under this order here, then we must be wrong.

273 Mr. BOE: With respect to things alleged in the complaint?

Mr. CRENSHAW: I won't admit anything in your complaint or your interpretation of it. We have our own ideas which we want to present to the court.

Judge SHAW: You admit that there would be damage if these orders were enforced, there would be damage to the plaintiff?

Mr. CRENSHAW: That is right.

Judge DUFFY: Does the Commission have in mind presenting any testimony here today? Or you had not planned that?

Mr. CRENSHAW: I am sorry, your Honor.

Judge DUFFY: You do not plan to offer any oral testimony on behalf of the Commission?

Mr. CRENSHAW: No, we object to offering any except on the question of damage, and we have confessed that out of it, I am confessing it out so the court can decide the question of injunction on my admission.

Mr. BOE: If there has been a taking of property, are you willing to stipulate it has been taken in the respects alleged in the complaint?

Mr. CRENSHAW: I will not. I will say now the complainant is completely in error in his interpretation of the law and the facts in the case. Therefore, I cannot stipulate.

Mr. BOE: I simply say can you stipulate we will suffer damages if the order becomes effective?

Judge SHAW: Whether \$10,000 or \$100,000 makes no difference at this time.

Mr. BOE: That is right.

Judge SHAW: He admits that by reason of the order of the Commission there would be some loss of property, some loss of business and revenue that you are now enjoying. Don't that leave us, as suggested, only a question of law?

Mr. BOE: I think in view of the stipulations of counsel we can proceed on that line.

Judge SHAW: Let us get on then.

Mr. CRENSHAW: Let me say one thing, to clear it up; he is saying what the Commission did, saying that you are doing more than the Commission did—

Judge DUFFY: We only want to get some idea here on the question of time. We are all busy now.

Mr. BOE: In view of counsel's statement, I think I can dispense with the calling of witnesses.

Judge DUFFY: How about time? Does anybody else want to be heard today?

275 Mr. BOE: I think I can finish my argument in ten minutes and ask for ten minutes to reply.

Judge DUFFY: Who else desires to be heard today?

Mr. COSSON: The State of Iowa is here, your Honor, and we can tell our story in fifteen minutes or less.

At this time I would ask counsel for defendants if they wish to make a stipulation that the Iowa communities are interested in the matter and they would be damaged, be-

cause we claim the nature of the evidence that was shown shows the Iowa communities were interested.

Mr. CRENSHAW: I don't think they have that sort of interest and I won't admit it for them. I think it is quite sufficient to admit it in the case of the carrier. That question is one that must be decided by the Commission, as to what their public interest is, and his point here is they need that service, and the place to get that from is the Commission, and I promise him here in the presence of the court if they come to the Commission on a 207 application, if you need some additional service, we will give it to you. They usually do.

Judge DUFFY: We will proceed here for 25 minutes, or maybe 20 minutes.

276 Mr. BOE: I think it is proper for the court to have the proceedings before the Interstate Commerce Commission before it and in the interest of saving time I have prepared a summary of these papers, and hand up three copies.

This summary contains the orders entered originally here, they contain the adoption notices we filed, filed by the plaintiff in pursuance of the orders of the Commission herein, and it contains also the certificates, the official certificates of the Interstate Commerce Commission.

Judge SHAW: How much of that is necessary for us to consider today? It is a long record now.

Mr. BOE: I don't think it is necessary to consider all of the transcript here but I mean it is necessary to have this record before you to show the course of conduct up to March 4, 1946 when this change of policy came about, on the re-opening of this record.

Judge SHAW: Well, could they lawfully reopen the record?

Mr. BOE: It merely confirms our contention that the Commission has violated the law when it reopened the case and I think that is demonstrated by this record.

Judge DUFFY: That is a question of law, whether  
277 they had the power to reopen it or not.

Mr. CRENSHAW: I thought I had understood that Mr. Boe might offer it as the whole record of the Commission, as he understands it, and we are here in defense, and if we find anything left out, we can supplement it within ten days.

Judge DUFFY: That is a fair offer.

Mr. BOE: We make that offer at this time.

Judge DUFFY: All right, proceed.

Mr. BOE: Do you want to give that record an exhibit number and have the different items that are listed on that memorandum numbered?

Judge DUFFY: I think one exhibit number will suffice and then you can mark it, if that is the custom of the case.

Mr. McFARLANE: Just call it Collective Exhibit 1, Plaintiff's Collective Exhibit 1.

Mr. BOE: They all follow in succession.

(Said exhibit, ~~88~~ offered and received in evidence, was marked Plaintiff's Collective Exhibit 1.)

Mr. BOE: For your information and consideration, we prepared and filed a petition for reconsideration of the order of March 4, 1946 which states the legal grounds  
278 of our presentation at this time. I ask it be considered as part of our argument, and I have handed up the memorandum brief.

Judge SHAW: We have seen it and examined it.

Mr. BOE: Then I also ask you to consider—

Judge DUFFY: Let me ask you before you go any further, wasn't there some policy of Congress disclosed in the Motor Carrier Act where it said that any other carrier, or anybody affiliated with someone besides regular motor carrier, under certain circumstances would be granted the right to apply for a certificate, for operation in connection with its other operations?

Mr. BOE: That is right.

Judge DUFFY: That shows some policy on the part of Congress, and some fear or suspicion or something, that the carriers might get control of the motor transportation and might freeze out the little fellow.

Mr. BOE: That is right, under the White Lines case, that was Section 213, and under the Frederickson case, that came along after the Transportation Act of September 15, 1940 was enacted, that was under Section 5-(2), subsection (b), subparagraphs (a), (b) and (c), and to simplify the statement, this Section 213 was reenacted into Section  
5-(2).

279 Judge DUFFY: Well, what do you say about this policy? Is that in your case in regard to what the Commission did?

Mr. BOE: Yes, the Commission in its order approving the transfer made the statutory findings that you indicate, namely, that the plaintiff should use motor carrier service to such points as required service that the Commission felt was within the public interest, that the plaintiff could use such motor carrier service to points on the railroad and

there would be no undue restraint of competition. It made those findings effective in the order of 1938, it considered those circumstances and decided favorably and made the statutory findings.

Judge DUFFY: Do you contend that after making a certificate and making those findings they cannot go back and change their mind about it and decide on a change, on new evidence?

Mr. BOE: That is right and I think that the Commission itself recognized that in the Smith Bros. case.

Judge SHAW: I understood you to say that there was no new evidence on the re-opening, merely a new finding.

Mr. BOE: In the instant case, yes.

Judge SHAW: No new evidence?

280 Mr. BOE: No new evidence and now they change their findings.

Judge SHAW: It is your contention they do not have the authority to do that?

Mr. BOE: In March, March 6, 1946, they reopened the case and go into the past findings shown in the original certificate which appeared at page 39 in the appendix and is referred to in the brief. Let me refer to that briefly, if your Honor please.

Judge DUFFY: That is the certificate and order appearing at page 39?

Mr. BOE: Page 39, you are correct.

Judge DUFFY: That has a provision that the carrier is granted certificate of public convenience and necessity, subject, however to such terms, conditions and limitations as are now or may hereafter be, attached to the exercise of the privileges granted to the said carrier.

Mr. BOE: That is exercising the privileges there granted.

Judge DUFFY: Yes, is it your position that they did not have the power to reserve that authority?

Mr. BOE: They had the right as they say here to attach conditions to the exercise of the privileges there-  
281 in granted and the privileges granted are those contained in this certificate.

Judge DUFFY: This certificate that was issued to the carrier containing that provision, subject to modification at some time in the future; that goes through the whole order, it is repeated on page 42 and again on page 44.

Mr. BOE: I have tried to answer it in my brief.

Judge DUFFY: I want to get your position on that. Do you concede they had the power to put that provision in that certificate or do you deny it?

Mr. BOE: I say they have the power to impose such conditions and limitations as are now or may be attached to the exercise of privilege granted. What was the privilege granted? It was the right to do these things, provide service on motor carrier routes, provide the service at motor car rates and perform the service at rail rates, but when they say you are no longer to publish motor rates, they are taking the privilege from you.

Judge SHAW: Do you concede they had the power to modify the privilege or the power to destroy it?

Mr. BOE: Not in connection with those privileges.

Judge SHAW: That is any and all privileges granted  
282 ed by the Commission?

Mr. BOE: Yes, sir, they were inserted in the White case, that is true, and the other one, the Frederickson case.

Judge SHAW: They were both granted by the Commission?

Mr. BOE: That is right. Now, Section 212 defines the limits under which the Commission may revoke a certificate in part or in whole, and you will not find in this order under attack where any attempt to justify this forfeiture is made under Section 212.

I mention that because the Supreme Court, too, recognized in the Seatrain case that the Commission's power to limit or revoke a certificate was conferred under Section 212 and that section alone.

They don't attempt to justify their action here under that section, they use some rather cryptic language about the reservation of their powers as they said in the Barker case and this is what they meant.

We are satisfied with what we were given by the 1938 order and that is what we ask the court to protect here, merely preserve what we acquired in 1938 and what we  
283 acquired under the Frederickson rights in 1943, and not to re-define those rights, which they claim the right to do in consequence of a change of policy, which was condemned by the Supreme Court in the Seatrain case, and which amounts to confiscation of our rights and a taking of our property and is an exercise of authority beyond the statutory power of the Commission.

May I have about ten minutes to reply to counsel?

Judge DUFFY: We will try to give it to you. You may have about ten minutes to present your matter. Proceed.

*Evidence and Arguments on Behalf of Intervenors.*

Mr. Cosson: May it please the court: My name is George Cosson, Jr., I am representing the State of Iowa *ex rel.* the

Iowa State Commerce Commission, in the office of the Commerce Commission of Iowa.

In making an application to intervene in this case, we stated in our record we had no new theory and no intention to broaden the issues in this case and we spoke for nothing beyond that.

Our position in this case, your Honor, is that the issues that have been presented by the plaintiff herein in its bill of complaint squarely passes up to this court the legality of the order of the Commission entered April 11, 1948, 284 and it is our position that the order is in truth and in substance a revocation in part of the certificate formerly granted by the Commission to the plaintiff herein.

Section 212 of the Act provides specifically the requirements which shall be met before a certificate of convenience and necessity may be restricted or limited and we maintain the effect of this order of April 11, 1948 is a revocation not authorized by Section 212.

In other words, it is an avoidance of the two mandatory requirements of Section 212 and therefore the order of the Commission is illegal and void.

Now, the position of the State is that the effect upon the company's employees and also upon the shippers and passengers between Iowa communities, on the lines between these communities is a hardship.

And then the order, it shows on the face of it, that consideration was not given, as required by the Interstate Commerce Act, to these effects, and the order is therefore illegal and void for that reason.

So that it may be clear that the interveners' presence here is on behalf of Iowa communities, associations of commerce and firms who have been receiving the service formerly given by the complainant herein, I should like 285 to state in open court that we have here in our files, 30 letters from 27 different Iowa communities which were protesting the order or which made requests that action be taken by the state so that this order of April 11th be not effective. I don't think these should be in evidence—

Judge DUFFY: What you are really complaining about is you are now getting service you don't want to lose.

Mr. Cosson: That is right, your Honor.

Judge DUFFY: That does not say that somebody else couldn't give you about as good service as you are now getting.

Mr. Cosson: Yes, it is the feeling of the shippers in the communities that that would not be true. We have cut

some oral testimony that we were prepared to present, but the fact is the communities along the motor lines, primarily the communities that recently have been receiving what they call a peddler service, which service consists of the delivery of packages of merchandise, and the Iowa Commerce Commission knows and I can state it as an argument and not as a fact, that the public service is provided at a loss, where it is the duty of the plaintiff here to do it and even if they can do it by railroad they can  
 286 do it cheaper by truck, and I know there is not going to be a substitute for the Rock Island by somebody else, of course if the service is rendered by the Rock Island or somebody else it makes no difference to us, but it is known to the Iowa Commission this service will not revert to another carrier.

So I wanted to mention these letters and our authority, to show merely that the Iowa communities do have an interest and they will be damaged and of course, the court has indicated what is the law on the question.

Judge DUFFY: I think you have made a showing and were right in intervening to present that point, but we really have to get down to the question of law involved here.

Mr. Cosson: I merely wanted the record to show that point.

Your Honor, the pleadings in this case, and we have just received an answer to our complaint in intervening, and no new issues are raised by the answer of the United States and the Commission, and plaintiff's complaint states that the order itself, that is the order of April 11th, fully states the basis on which it was entered and, as I  
 287 understand, nothing new under the pleadings can be raised by the defendant.

The order stands on its own feet, it is a lengthy order and citations are made therein, so we need go no further than the order itself, to discuss our position with regard to the order of April 11th, and it is that there is basis for the assumption by the complainer herein that the previous order authorized the kind of service rendered by the Rock Island, that is, motor carrier service on or under motor bills of lading and so on.

I just cannot understand the Commission's order, because, as Mr. Boe pointed out here, about half the commissioners themselves apparently so understood it, as well as did the plaintiff when it proceeded to act under that order. Consequently, I see no ground for or the necessity of the entry of any such order.

The second fact is that the record shows clearly that these Iowa towns have been receiving this motor carrier service continuously since the time of the original transfer, so there has been an open and public operation.

Now, we all know they have investigators to see to the enforcement of their acts, as if somebody by mistake  
 288 { picks up a package in a truck to a place where they don't have distinct authority to go, that is within the purview of enforcement, but so far as I can see there has been no question of enforcing the original order, whereas the order in question has not really changed anything, that is what the order says all along, but reading it lends credence to the fact this order has actually changed by revoking parts of the certificate and is not a mere restatement of the original principle set out by the Commission in its original certificates.

Some mention was made about tariffs or rates and, of course, it is not a great question, I might say, about how an Iowa community might be affected if the order is put into effect, motor carrier tariffs would not be authorized for an Iowa community that was interested in receiving goods from some other community in the United States which was, for example, served only by the motor carrier, and under the original order the carrier publishing that tariff could be required to provide motor service, motor service could be required to be furnished to that community. But if the motor transport company could only furnish communities with rail service, then there are some Iowa

289 communities that have no trucking facilities at all at present and those communities will just not be able to get merchandise from other towns in this country served only by motor trucks. That is my understanding of one of the effects of the order, if they cancel the motor tariffs.

Mr. Boe says we are not interested in rates, but the type of motor operation is something that is distinctive and cannot be supplemented by adding rail service wherever rail service exists, and some communities now having motor service and rail service, so they can be interchanged between the rails and motor service, will then be denied this benefit in these communities.

The fact that the practice of the Commission has been to authorize all this service, all these things, brings to mind the old rule of law that an administered rule long continued is evidence of what the law is and the plaintiff evidently thought that was what the law was and the effects of this

order is to prevent plaintiff from furnishing the sort of service the plaintiff wanted to maintain and that the Iowa communities wanted maintained.

The Commission, if it is now making a new policy could go ahead and make an enforcement order and put in  
290 a new one whatever they want to do, but it seems obvious to me the Commission could not attempt to eliminate under the old order the motor tariffs and that is what is attempted to be done by the revocation contained in the April 11th order, which is clearly prohibited by the Seatrain case.

In view of the time limitation I don't want to read the cases already cited by the plaintiff in this case, but I cite the Boulevard Transit case in 77 Fed. Supp. 594.

Judge DUFFY: I was trying to find out if that case had ever been appealed; that was a three-judge case.

Mr. COSSON: That is a three-judge case, from New Jersey.

Judge DUFFY: Was it appealed? Do you know the history of the case?

Mr. COSSON: Not that I know of.

Judge DUFFY: It was decided in 1948.

Mr. COSSON: It is not controlling on this court but I think it is very persuasive. The court there said the Commission is without authority to modify the certificate once it is issued, unless it comes within one of the sections of Section 212 of the Act. Now, those were generally the terms of the Boulevard Transit case.

291 It was my thought in connection with the power of the commission here in insert a reservation of power, it is my own personal interpretation of Section 5 of the Act, that the act specifically provides the right of the Commission to insert the reservation when they make a grant of a certificate, and I am not making this as a statement, I didn't find myself any statutory authority that the commission in issuing a certificate may reserve the right later to impose a restriction of this sort, and the difference I am trying to point out here is that they can issue a certificate and put in it certain restrictions and then the carrier can take it or leave it.

Judge DUFFY: But just listen to this restriction in the first certificate: "Subject, however, to such terms, conditions, and limitations as are now or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

Mr. COSSON: Mr. Boe's point I think covers it, the privilege and exercise of it cannot be conditioned but they claim they can, by their own terms, they can put a restriction on the exercise of the power that is previously granted. It is my point that I do not see a place in the statute which gives them the right after the issuance of a certificate, that they can later come in and put in a new restriction.

Judge DUFFY: Then you did say, didn't you, they would have a right legally to put in a restriction at a later time, having said subject to restrictions that may hereafter be made?

Mr. COSSON: I don't see any authority for that "hereafter made," it is merely a phrase used by the commission, and that is my personal position on that. It seems to me that comes within the rule and is analogous to the policy of rejecting an artificial condition, that was followed in a long line of cases where a state qualified a foreign corporation and said, "You can qualify the state but you have to agree not to go into the Federal Court."

There is a case pending now which will interpret the intent of Congress in passing Section 212. I think they are trying to get around Section 212 and put an illegal construction on that language.

One other thing here, your Honor, the Commission in this report, which is in question before the bench here, refers to the fact whether or not this is unduly restricting competition and so on; it seems to me since this operation has been in effect for many years in Iowa and in this report referred to there is not one scintilla of evidence which tends to show that the operation of the complainant here, as it did actually take place, resulted in any undue restraint of competition.

Now, the statute says, "undue restriction of competition;" apparently they restrict it to some extent.

Judge DUFFY: Wasn't there some appearance before the Commission of some truck lines or something?

Mr. COSSON: There was, I understand the Truck Association made their appearance, but no evidence was entered. What I am trying to get at is if the Commission is trying to base its order on the theory of competition being unduly restricted, it would surely be simple for some of the communities to come in and show it, or require the carrier to come in and defend it. If the Commission wants to change its policy, then it could have had some evidence after eight years, in that time they could have had some evidence but

there wasn't a word of it, and as I understand the record, there was only the appearance of some representative of the trucking association.

294 That brings this order into the status of being illegal because it was not based on evidence, it is only theory they are working on, that this operation would work to create an undue restriction of competition, in an operation that existed for eight years, and if they wanted to affirm that theory they could have had evidence.

I think my time has passed, but I certainly say I think we should be conservative in considering the Commission's order; I think under the circumstances there would be an injury to all concerned from the operations of the report of the Commission in 1946, where the minority report said the effect of the majority report in their opinion, unsupported by anything in this record, would be unfair to the carrier which investigates frauds in this property pursuant to prior authority permitting unrestricted operations under the rights acquired.

Judge DUFFY: We will resume in ten minutes.  
(Recess.)

Judge DUFFY: Who are we to hear from now?

Mr. SASSO: If your Honors please: I am Henry E. Sasso and I represent here the intervener, the Omaha Chamber of Commerce of Omaha, Nebraska, and in view of what has been said here, all I wish to say is that this order of the Interstate Commerce Commission would  
295 have an adverse effect upon the shippers from the city of Omaha and for the same reasons as set forth by Mr. Cosson on behalf of the shippers from the State of Iowa, and I concur in the arguments of Mr. Boe and Mr. Cosson as to the legal reasons why it should not be permitted to stand.

Judge DUFFY: Thank you for being brief and to the point.

Anyone else? We will hear from the Commission then.

*Evidence and Argument on Behalf of United States.*

Mr. McFARLANE: May it please the court: My name is W. D. McFarlane, Special Assistant to the Attorney General. I represent the United States Government in this matter as the appointee of the Attorney General, and I would first like to hand to your Honors a copy of our trial brief in this case; copies have been handed to all counsel of record in the case except the Omaha Chamber of Com-

merce. We did not have an extra copy for them and a copy will be mailed to them.

I might agree in reply to the intervention of the State Commerce Commission of the State of Iowa for, as I understand the gentleman's remarks, one of the principal objections made, reasons as to why they were supporting  
296 the transit company in this matter, was they were afraid that it was going to cut out the peddler car service.

That is just the point that we are trying to maintain in this matter, it is to further clarify and require the transit company in this case to render the peddler car, the kind and character of service that was granted to them at the time of the issuance of the certificates under which they are supposed to operate, namely, peddler car service and less than carload service at different points on the railroad involved in this case.

Judge DUFFY: Well, do you think your order and report will result in more service than they are now getting or as much? Is that your contention, that these communities would have as much of that service, if your order goes into effect, as they get now?

Mr. McFARLANE: I don't think there is any doubt but what they would. It would not affect the peddler car service, I cannot see that it would.

On the other hand, if they would eliminate what they admit is their long distance motor carrier service or common carrier service that they are rendering and get  
297 back to their auxiliary and supplementary service that they were authorized to render, it seems to me they should be able to render to more efficient peddler car service which, as the legislative history of the motor carrier act shows was the real intent of the Congress in permitting this kind and character of service to be rendered.

Judge SHAW: Has there been any change in the character of service since the certificate was issued?

Mr. McFARLANE: That I am not in a position to answer, your Honor. Certainly from the record made in this case and based upon the Commission's decision in this case, it seems clear that the Commission is of the opinion of the necessity of further conditioning and limiting the kind and character of service that the transit company has been rendering the kind and character of service I have in mind.

Judge SHAW: The point I am getting at, you are talking about getting back to something, I am asking the plain question, has there been any change in the character of

service since the issuance of the certificate, the original certificate of convenience and necessity?

Mr. McFARLANE: I am not in a position to answer that, your Honor.

Judge SHAW: Is that not a material question?

298 Mr. McFARLANE: In our trial brief we have handed to your Honors we have briefly traced the legislative history of the Act, the Motor Carriers Act to show the legislative intent.

Judge DUFFY: You say the service they render exceeds the privileges that you granted them. Now, when did that come about? Give us some sort of an idea. Is that something you just discovered in 1946 when you opened up these proceedings or did that exist before? What is the situation?

Mr. McFARLANE: I assume, your Honor, that it being the duty of the Commission to enforce the statute as it is written and their rules and regulations under the statutes, that they brought these proceedings on their own motion, as this record in this case shows, and brought this matter before them as soon as they discovered the carrier was exceeding its certificated authority.

Judge DUFFY: What is there to show that in the record? On page 3 of your trial brief, which you just handed up, you say "On February 5, 1945 the Commission upon its own motion, entered an order reopening for reconsideration on the existing records"—

Mr. McFARLANE: Yes, sir.

Judge DUFFY: Is that all the evidence you had?

299 Mr. McFARLANE: That is the reason for my statement and the assumption I have just made, your Honor, that I assumed that the Commission was doing their statutory duty in going into this matter as soon as the matter was called to their attention, and, certainly the Commission's report in this case indicated that they were giving every consideration to the complainant in this case because on a reconsideration of the record the complainant was given an opportunity to offer whatever evidence they desired to show that under the certificated authority that they were not exceeding their authority and that they were operating in compliance with it, and they offered no evidence of any kind.

Judge SHAW: Were they required to offer any evidence in the absence of a complaint?

Judge DUFFY: In other words, was there a burden on them, because the Commission opened the matter up, to jus-

tify what they were doing without anybody saying that they were doing wrong, that there was a necessity for it?

Mr. McFARLANE: In an over-all consideration of this matter, your Honor, it seems to me that when the notice went out from the Commission to the transit company and all parties to whom the notice was mailed, under the law that should certainly put them on notice as to the investigation that was to be made and would be made by the Commission in going into this entire picture, and that brought the entire proceedings before the Commission for further consideration, and certainly that called to the transit company's attention the matter that would be considered, and there has been quite a good deal of reference made to the Barker case and I would like to call your Honor's attention in that respect that that was a third application that was filed under the Motor Carrier Act by subsidiary of the Pennsylvania Railroad Company to conduct a rail-truck service, such as we have in this case at bar, and the Commission had shown their intention and their attitude in a service of this kind and went thoroughly into the matter, into the different decisions under which they considered the Barker case and they have given consideration to this so-called new kind of service that was to be rendered by a subsidiary of the railroad company.

Judge DUFFY: Is this what happened here, Mr. McFarland? That the Commission gave this notice, that they would have an opportunity to present evidence but the Commission did not say that a complaint had been made and that an investigation showed the carrier did not bring in any evidence and on the record that was before them from the time the certificate was first issued, and they then issued this other order, this restrictive order, is that the way it actually happened?

Mr. McFARLANE: That is the way I understand the record, your Honor, and in their report issued at the same time as the order they have summarized and gone thoroughly into the matter and given fully their reasons for the additional limitations and conditions that they have placed in their order.

Judge DUFFY: But it was not based on any additional evidence, was it? No evidence was offered by either side.

Mr. McFARLANE: That is true, as I understand the record.

Judge SHAW: Do the rules of the Commission provide for a rehearing when an order is entered, if someone don't

like the order you have entered, does the Commission provide for a rehearing in a specified time?

Mr. McFARLANE: Yes, sir.

Judge SHAW: Is there statutory authority for re-  
302 opening the matter after the time has gone by?

Mr. McFARLANE: Yes, sir.

Judge SHAW: What is the statutory authority?

Mr. McFARLANE: I have gone into that and we quoted from that—I will be glad to read it, your Honor.

Judge SHAW: I mean on the same record without any additional evidence or any complaint?

Mr. McFARLANE: Section 17, subsection 6 provides among other things: "After a decision, order or requirement, an individual commissioner, or a board, or after an order recommended by an individual commissioner or a board, shall have become the order of the Commission as provided in Paragraph 5, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, may make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the

303 decision, order or requirement was made by a division, an individual commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument or reconsideration may be granted if sufficient reason therefor be made to appear: but the Commission may from time to time, make or amend general rules or orders establishing limitations upon the right to apply for a rehearing, reargument, or reconsideration of the decision, order or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument or reconsideration of the matter assigned to or referred to an individual commissioner or a board, under the provisions of paragraph 2, if such application shall have been filed within 20 days after the recommended order in the proceedings shall have become the order of the Commission as provided in paragraph 5," and so on—

Judge SHAW: How long?

304 Mr. McFARLANE: Twenty days, "and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing."

Then sub-section 7, reads as follows:

"If after rehearing, reargument or reconsideration of a decision, order or requirement of a division, an individual commissioner, or board, it shall appear that the original decision, order or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument or reconsideration as an original order."

Judge DUFFY: What do the rules of the Commission provide in the way of a rehearing—

Mr. McFARLANE: I don't get the court's question.

Judge DUFFY: Is there any limitation of time for a rehearing, I asked the question is there any limitation of time for a rehearing, five days, ten days?

305 Mr. McFARLANE: I am not sure, I just asked counsel for the Commission.

Judge DUFFY: What do you say?

Mr. CRENSHAW: No, I don't have them with me, I didn't anticipate we needed them.

Judge DUFFY: What do you say about that? Could they have a rehearing?

Mr. CRENSHAW: Could they have a rehearing? I think they could under the Commission's rules, it would have to be authorized by a special order.

Judge DUFFY: I don't mean that, I mean if anybody could come in within five or ten years?

Mr. CRENSHAW: No question about it, yes, they may ask for a rehearing and the Commission will decide it. Anybody can come along and ask for a rehearing on something that transpired twenty years ago. We frequently get that even after the rules have expired, as far as asking for a rehearing on the filing of an application, even after the time has passed, parties to the transaction frequently come in and make application for a new hearing and we sometimes grant it.

Judge SHAW: Some of the parties may come in and ask for an alteration or change in the authority, is that what you mean?

306 Mr. CRENSHAW: Yes, and an opponent could come in and ask for a modification of the rule on the ground they were operating beyond the scope of their authority.

Judge SHAW: You say here they asked, in the New Jersey case and the Barker case for a rehearing at the expiration for the time for the hearing; what do they mean by that?

Mr. McFARLANE: I don't remember that case, your Honor, I will have to confess that, but at any rate, they mean there was no application for a rehearing, they mean the time had expired.

Judge SHAW: They made no application for a rehearing, what do they mean by that?

Mr. McFARLANE: They mean the time for a rehearing had expired, they did not mean that the Commission in its discretion, could not grant a rehearing.

Judge SHAW: There is no such question in this case because no rehearing was asked.

Mr. McFARLANE: No, we have no application for a rehearing. The proceeding was initiated by the Commission on its own motion.

Judge SHAW: It amounts to a rehearing.

Mr. McFARLANE: It amounts to reconsideration, your Honor.

307 Judge SHAW: What is the difference?

Mr. McFARLANE: It may or may not be a rehearing, it is—

Judge SHAW: You are having a reconsideration or rehearing, whichever you want to call it, on the same old record, on the order of the Commission.

Mr. McFARLANE: I thought your Honor meant it this way, I thought you meant by that—

Judge SHAW: No, you have no alteration of the case, you have no new questions of proof, but you are having in addition to the record a reconsideration or rehearing or what have you, a rehearing on the old record on your own motion, without anybody applying for a rehearing.

Mr. McFARLANE: That is right.

Judge SHAW: What is the statutory authority for that?

Mr. McFARLANE: The authority for that is in the terms of the certificate issued, we have a right to reconsider it for

a certain purpose and that purpose was to restrain them within the bounds of what was granted them in that certificate.

Judge SHAW: You claim by that reservation you have the right to impair and diminish the authority that was previously given?

308 Mr. McFARLANE: That is right, your Honor, that is why we include in that certificate the reservation of power to restrain within the bounds of the authority granted.

Judge SHAW: What gives you the right to restrict?

Mr. McFARLANE: None without reason for the restriction, your Honor, you have to suppose they are operating beyond the bounds of their authority.

Judge SHAW: Section 212 provides for that, doesn't it?

Mr. McFARLANE: I will admit right now we had no right to tamper with that certificate on the basis of Section 212. It is under the terms of the certificate itself.

Judge SHAW: It is a legal question whether or not the terms are valid, is that right?

Mr. McFARLANE: If that is valid, then it means we have restricted them to auxiliary service of the railroad and if they are going beyond that, it provides we can restrain them.

Judge DUFFY: That is the whole question, I guess the railroad company agrees to that, that is the whole question.

Mr. BOE: Yes, we do.

309 Mr. McFARLANE: I think that is the whole question involved in this case.

Going back to the Barker case which the railroad say they cannot understand—

Judge DUFFY: You don't claim the Barker case is binding on this court, do you?

Mr. McFARLANE: No, not at all, your Honor, only to the extent it shows and as we have pointed out in the report of the Commission in this case at bar, they have stated I think clearly in the Barker case and in the scores of other cases that have been heard by the Commission, of this same kind and character, which we have copied and attached as appendix "B" to our brief, they have shown as I think is apparent, the intent of the Commission in attaching these conditions to the operating authority of the subsidiaries of the railroads, that it is the intent and requirement of the Commission, in line with the clear legislative intent of the Congress, that all such service as this shall be

auxiliary to and supplemental of the rail service, and that is the condition the Commission had inserted in more than one hundred of these cases down from the time the Motor Act was enacted, down to the time the case at bar was considered, and when it was discovered the transit company in this case exceeded their authority, they then, on their own motion brought this matter back to the Commission for reconsideration, to further limit the right written into the certificate and further classification of those conditions.

Judge DUFFY: Why do you say they were exceeding their authority? You are standing here on the prior record, why do you say they were exceeding their authority under the certificates they already had?

Mr. McFARLANE: You mean what is my opinion and what is my reaction to it, and I say that, for this simple reason, your Honor, for the reason that the railroad people can clearly understand the wording of all these decisions, and they did not appeal from the wording inserted in their certificate in the White Line case, in which the Commission provided in what seems to me clearly, easily understood language that the transportation company shall operate a service auxiliary of and supplemental to the rail service, yet they come back and say that is a geographical limitation. If that was a geographical limitation that the Commission intended they could have written a geographical requirement into the order, without going into the detailed conditions that they have continuously written into these franchises that have apparently been understood by the subsidiaries of most of these different railroads.

Judge DUFFY: They took the White Lines franchise under that.

Mr. McFARLANE: Yes, the railroad subsidiary, the transit company, intervened, and, as I understand the record before the Commission a certificate was granted to them as the successor in interest, and under the conditions stated therein and in the words of the report, it is shown they were to render an auxiliary and decision they referred back to the Barker case and these other cases, in which they had gone into that matter and had required these motor carrier operators to eliminate all of the off the rail service and all of their service other than the service that was required to add to the rail service as an auxiliary and supplemental service.

Your Honors, in their briefs and arguments, they don't refer to the auxiliary and supplemental service, as to what the legal meaning and limitations of the language is. It seems to me it is easily and clearly understood, it seems to me it clearly means it is to be restricted to an auxiliary and supplemental service to the rail service, which

312 the Commission in all of its decisions have been writing into their decisions and have been trying to continuously clarify to these railroad companies who apparently don't understand that simple language, and to make it clear they have to separate the peddler car service from less than carload service, in regard to points on the railroad, for that kind and character of service.

Judge DUFFY: What you are objecting to, for instance, is the transportation by motor car of freight from Chicago to Omaha, do you say that is improper under the certificate?

Mr. McFARLANE: Well, that could be one of the objections unless the motor car service was a supplementary and auxiliary service used in getting away from the shipping point.

Judge DUFFY: That point was put in there to break that sort of thing up?

Mr. McFARLANE: To break that sort of thing up and limit them to intermediate service, and all of these decisions which have been made on the issue by the Commission and which are entitled to great weight and the Supreme Court says they are entitled to great weight because the Commission is the agency charged with the responsibility

313 sibility in this case, charged with the responsibility of enforcement in this series of acts, and we have shown that the agency that has to do with the statutory provisions, and provides that the Commission's acts and things done under them are entitled to great consideration and clearly under all these decisions and under the limitations and conditions that have been placed in the decisions and reports of the Commission it is shown us that it was the intent of the Congress, to show that it so limited our railroads to keep them from competing, not only with the railroads, but, competing with all the other motor carriers, and if the truck lines of the railroads were to compete with these carriers and allowed to operate on all-motor service, they would drive out the independent motor carriers that were in existence under the certificate rights granted by the Commission.

Chairman Eastman made it clear before the Congress at the time he drew the bill and introduced the bill that later became the law, that it was not the intent of Congress or the Commission's intention to permit the different kinds and characters of services rendered by independent motor carriers, to be driven out of business.

314    That matter came up in debate and I have stated the wording used by those in charge of the bill in both the House and Senate.

Senator Wheeler in his presentation of the language of this section, which is Section 52(b), referred to the language of Chairman Eastman, as well as the Chairman of the House Committee who handled the legislation, and we have quoted copiously from Chairman Eastman, who said it was clearly intended to provide for this auxiliary service, and that was further clarified in the Transportation Act written in 1940, that it was clearly the intent of Congress that this service shall be kept separate and remain separate from any kind and character of service rendered by the railroad company and the independent truckers, separated from the service rendered by subsidiaries of railroads, to keep these different services separate, and the only thing controlling the grant of authority to those who could render those services, was the public benefit and interest, the service rendered to the public generally.

Now, it is clearly shown in that legislative background and in the whole field of the Commission's findings in each and all of these cases, that this plan is clearly indicated.

Judge DUFFY: You say clearly indicated, some of the Commissioners did not think it was so clear, you have  
315    a respectable difference of opinion.

Mr. McFARLANE: Only three of them, your Honor, Mr. Mahaffey, Mr. Mitchell and Mr. Miller, that is only three. There are eight to three, that is the extent of the dissent in the case at bar.

Judge DUFFY: There were dissents as to other parts of the findings of the Commission, of course, but that group said it was upon form, in substance they came to no other finding.

Mr. McFARLANE: No, I admit there is plenty of room for difference of opinion, your Honor. So that is the situation in that respect.

Now, as to the Fredrickson Purchase, and both of those matters come under Section 52(b), formerly Section 213.

It is true that that report of the division did not, the original report did not contain any condition in that matter prior to the issuance of the certificate and that is why Section 212 in our opinion has no application here because the certificate in that case has not yet been issued.

Judge DUFFY: The certificate has not been issued in the Fredrickson case either?

Mr. McFARLANE: In the Fredrickson case and the Commission had under reconsideration placing in that  
316 certificate the five conditions, the same conditions that had been placed in the White Lines case originally.

Judge SHAW: The complainant cites that the Supreme Court points out and the Commission itself pointed out that it has no power to revoke a certificate except under Section 212.

Mr. McFARLANE: That is when a certificate has been issued, and we have submitted authorities—

Judge SHAW: After the certificate has been issued and the time for rehearing has expired, the Commission itself has held it has no power to revoke that certificate except for cause. At least the Supreme Court of the United States has said so. What do you say to that?

Mr. McFARLANE: That is just the point I am referring to. In the Fredrickson case the certificate had not yet been issued at the time the Commission made its decision to reconsider it.

Judge SHAW: The White Line certificate was issued back in 1938, wasn't it?

Mr. McFARLANE: Yes, sir.

Judge SHAW: Where did you get the authority to revoke it? I assume that if you have the authority to impair it you should also have the authority to revoke it.

317 Mr. McFARLANE: Under the decisions that were placed in the White Lines case, your Honor.

Judge SHAW: What is the object of Section 212 then if it does not provide the other party with a place and time for hearing and a chance to be heard?

Mr. McFARLANE: It is our position under the limitations that were placed in the White Lines decision that the Commission had the right on a proper notice to reconsider the matter and to go into that matter and to render such a decision as the facts in the situation justify.

Judge IGGE: Do you claim you have that right under the terms set forth in the certificate issued by the Commission in the White Lines case?

Mr. McFARLANE: Yes, sir.

Judge DUFFY: That is the only point in the lawsuit.

Judge IGOE: I would agree on that, that is the only point in the lawsuit:

Judge DUFFY: Anything further?

Mr. McFARLANE: In conclusion, I would just say this, your Honors: That the opinions in the cases we have included in our brief, we have cited our authorities that are  
 318 conclusive regarding the orders involved in the case, as we see it, we have cited the authority for the basis of our belief that the Commission's report and order should be sustained for the reason that they have not exceeded their statutory authority, they are well within their rights in revising the conditions and including the conditions that have been placed in these orders, and the complaint should be dismissed.

Judge SHAW: Have you cited any authority other than the decisions of the Commission itself?

Mr. McFARLANE: Oh, yes, I have cited copious authority for that, your Honor, and bearing in mind the Commission's report and orders in this case, the authorities which it has cited here with which we are in hearty accord, we have cited U. S. Supreme Court authorities which support the position we have taken and we believe it is strong and the complaint should be dismissed.

Judge SHAW: Have you discussed the Boulevard Transit Company case?

Mr. McFARLANE: No, we have not, your Honor, but we have discussed other cases, and Supreme Court cases that cover the case at bar.

Judge SHAW: Do you wish to be heard?

Mr. CRENSHAW: Your Honor, you have sufficient time?

319 Judge SHAW: Well, we do if you can confine yourself to ten minutes.

Mr. BOE: And five minutes for a reply?

Mr. CRENSHAW: That much time won't permit me to get into the case and it happens I did not have a brief prepared in this case and I apologize for it. I think that is the first time that ever happened to me in a case. I would like the Court to give me ten days, if you think that is reasonable, to submit a brief and that will contain a reply to the plaintiff's argument which you have heard today and I can state that in briefer form to the Court than I can in an argument.

Judge DUFFY: Just point out what you think are the high spots and the law.

*Argument on Behalf of Commission.*

Mr. CRENSHAW: Just these; it is not a question of Section 212. I admit if that were it, we would not have a case in court; I admit it is not a case of statutory authority particularly in this specific case, and I contend that this is a case in which we are simply struggling to bring the operation of this plaintiff within the scope of what we granted him in that first White Line grant of authority.

He interpreted it, and I want to clear this up for a moment, he interprets this grant this way—  
 320 I mean counsel for plaintiff says evidently plaintiff has interpreted it this way for a good many years. I do not want to claim any extraordinary intelligence or anything else for the Commission or myself, either one, certainly not, but I do ask the Court to consider of what the Commission had to deal with, what the scope of this act was, the result of which was over one hundred thousand motor carriers applied for new certificates, and we have quite finished with those, I can say quite literally just thousands, out of which we only have two at bar.

I don't know how many the Rock Island has, but looking at those listed in 1946 you will find listed there more than twenty-six cases of the Rock Island subsidiary, and it is a big thing, and I must say the Commission has had only two guides in this matter:

One was what Senator Wheeler and Senator Eastman gave to Congress when they adopted the Motor Carrier Act, in that they told Congress, and I don't think anyone can dispute or doubt that fact, "We are not going to permit the railroads to develop themselves into motor carriers." That is the background right there, and this

321 is a big question, vitally important to the country and to the railroads, because it involves the Pennsylvania and all the railroads in this country who are doing it now.

In that connection Senator Wheeler and Senator Eastman have pointed out repeatedly, again and again, the desirability of auxiliary service of railroads, and that was upheld in this court in the Chicago and North Western Railroad case right where they held the railroad had a right to develop itself an auxiliary service, and then two later cases, the Parker case in the 326-1, that is No. 4, that is cited in the preliminary brief; and by the way, I adopt that as our preliminary brief for the Commission.

Judge DUFFY: 326 U. S., 1.

Mr. BOE: The Parker case is not under the same section of the law.

Mr. CRENSHAW: Wait until I get through with it and maybe you will think it is.

Judge DUFFY: That is the Parker case?

Mr. CRENSHAW: Parker case, it is the case that immediately follows—

—Mr. BOE: 326 U. S.

Judge DUFFY: What is the other one?

Mr. CRENSHAW: The other one follows the Parker 322 case immediately.

Mr. BOE: That is the American Trucking Association.

Mr. CRENSHAW: I will refer to these in the brief.

Judge DUFFY: You are talking about the passage of the Act, and leaving those things out, with reference to the railroad, when the Commission entered its order permitting this operation they knew the Rock Island was really the owner of the White Lines.

Mr. CRENSHAW: Yes, that is right, and that is the reason I listed it, why they put it in there.

Judge DUFFY: What was given to the White Lines was given under the grandfather clause.

Mr. CRENSHAW: No, that is all wrong, I think I can show you that, but I can't show that in five or ten minutes. They were wrong for the reason the operation of the White Lines was that of an independent separate motor carrier, and if you had given it to them you would have given the railroad to operate that as such, and that was not what they intended to do. That is the reason we put in there the reservation that later on we might restrict this to the auxiliary service of the railroad. There would be no meaning to the restriction if it did not mean that.

323 Now they read a whole lot here today into these orders which is not in there. For instance, this order does not keep them from issuing tariffs.

Judge DUFFY: Issuing what?

Mr. CRENSHAW: Tariffs, they can issue all the tariffs they want to, if they will limit the tariffs to the authority granted them. They don't need a new grant, we made a grant to them originally in 1938. If that contention of theirs was true, I would confess immediately we were wrong under the law and should be immediately thrown out of court. If I can't convince you of that, I would be lost in any court. It is not a question of service here or

a change in the service, and if we are changing the service, it is only putting them back in precisely the situation where the service we were authorized to give was that which they had a right to do within the purview of the White Lines.

Judge SHAW: I asked your colleague, has the condition changed, that is, how has the service changed?

Mr. CRENSHAW: I don't know what precipitated this, but it is part of an effort on the part of the railroads to get control of the motor carriers. Here is what Senator Wilson and Senator Wheeler said when Congress adopted the Bill, "We won't let the railroads take over the motor carriers."

324 Judge SHAW: Are you claiming that right here?

Mr. CRENSHAW: No, sir, I claim no right for myself or the Commission; we can only do what the law permits us to do, as set forth in the statute.

We are dealing with another certificate case, there is another case like this pending down in Dallas and there will be others. If you want to see where it comes in, the Commission had only to look the other way and they could have done it a long time ago and you would have seen a condition arise where they would transport freight all the way from Chicago to Omaha and back again, as a motor carrier, and that is what the Commission did not intend for them to do when they gave them the White Lines.

Judge SHAW: Couldn't they be charged with that violation, if that is a violation of the certificate?

Mr. CRENSHAW: Why do that? If you can give them the White Lines and did not give them authority to do it, why do it? If they are doing that under the interpretation by the company, why is it not proper for the Commission to take it up and order an interpretation, and it is for the Court to say whether they should or should not, that is the language in the cases—

325 Judge ICUE: Isn't there some provision in the Code whereby you can proceed against them?

Mr. CRENSHAW: You can bring them into court by suing them.

I want to say one thing more, I didn't say it before, I want to say with all the vast work, all we had to do with motor carriers, some of these things come up and it is a confusing situation, it is not an easy situation to understand. We had so many things to do, it should not be done instantly and what the Commission was trying to do and obviously would have liked to do was to be fair to the railroads and we didn't want to put too many restrictions on

them, because as Mr. Eastman himself said to Congress, he said within the scope of the railroad, the railroads can use the service to great advantage to themselves and the public.

When they began operating in this case and later operated all the way from Chicago to Omaha, and there is quite a difference, when you consider that sort of service and compare the peddler car service to the service they are talking about, and it is clear why we did not want to put a limitation on that and why we put this reservation  
326 in that order, and so for a railroad to start an all motor service running all the way, we can try to stop it, and we put the restriction in there, to stop this motor service between Chicago and Omaha, but we are not disturbing in any place their auxiliary car service. We are in favor of that, which is what the law provides and is clearly what the Congress intended.

That is about the case for the Commission and if you give me a brief time, about ten days, I will try to clear up the points made and make them clearer than I can at this time.

Judge DUFFY: You may have ten days from this date to file briefs. That applies to all parties.

Mr. CRENSHAW: I appreciate if you give me that time; you cannot decide the case before the 15th of October, and if it would be desirable for me to extend the effective date to some date after that time—

Judge DUFFY: I guess that is probably correct. All three of us are extremely busy, you are dealing with very busy men.

Mr. CRENSHAW: I hope you are not as busy as I am, I am preparing two cases in the Supreme Court right now.

Judge DUFFY: I think you ought to agree right now on a later date, that shall be granted from the October  
327 15th date, because if the other parties want to file briefs—

Mr. CRENSHAW: I should just like to have an idea of the time you want it extended to.

Judge DUFFY: I think it should be extended to such a time as we can decide it. We are all working to a certain schedule.

Mr. CRENSHAW: I want to be liberal with the Court in that regard. I don't want to impose on it.

Judge DUFFY: December 1st my colleagues suggest and I agree with them.

Mr. BOE: Plaintiff and intervenors will be permitted ten days thereafter to reply to the brief.

Judge DUFFY: Yes, you will have ten days to reply and that will be the end of the briefs. You may have five minutes now.

*Reply on Behalf of Complainant*

Mr. BOE: Thank you. I think I can do it very quickly.

I respectfully invite attention to the decision of the Commission, in answer to a lot of Mr. Crenshaw's remarks, to its decision in the Campbell 66 case which was stated at 49-50 of our petition for reconsideration.

Now I think Judge Shaw asked a very pertinent  
328 question, which was not directly answered, that is what has happened in the interval between 1938 when the Commission approved this deal and the present time, actually to change the situation. We are doing nothing and have done nothing for the past eleven years except what the Commission has ordered us to do, when they directed us to take over the White Lines, permitted us to take over the White Line and we were ordered to adopt the White Lines' tariffs.

That was not a discretionary matter on our part, that was the order of the Commission, and we have in this transcript here the Commission's special circular: No. 1, that is item 9 in this big transcript, I think it is identified by separate volume number so I think it is readily accessible, in regard to the adoption of tariffs of the predecessor, on transferring the ownership of its business, the business of the motor carrier, and these tariffs were not printed or originated by us, we were ordered to adopt those tariffs, and they show in Volume 12 some ten or fifteen tariffs, Rock Island tariffs now, where the same thing happened, and the same course of conduct by the Commission was followed over the period of eleven years, when they ordered us  
329 to adopt the non-affiliated independent motor carriers tariffs, not rail tariffs, not the peddler service.

In other words, the Commission is trying to say by its order of approval we were limited to an exclusive auxiliary service we are literally and actually operating under their original permission, they directed that service and we are doing that, but they ordered us at the same time to do this all-motor service, permitted it and ordered it, and they say in the 1948 case, in the Parker case, they designate what the Pennsylvania Truck Lines were doing upon miles of distance—

Judge DUFFY: You think loading up a truck here in Chicago and transporting freight away to Omaha, you call that supplementary to the railroad service?

Mr. BOE: That is something in addition and the Commission recognized that in the Barker case, they recognized it again in 1948 and they restated that in permitting the Pennsylvania to do it when they made statutory findings and decided that would not unduly restrain competition, and that is what Congress said the I. C. C. must make a finding as to it, as you will see in Section 5-(2). They applied the law in 1938, they said there would be no  
330 undue restraint of competition. They say we have investigated the record and the law and they found no undue restraint of competition.

Judge DUFFY: That was before you started operating.

Mr. BOE: That was before we started operating.

Judge DUFFY: They say you have done more than you expected to do, you have been enlarging upon it.

Mr. BOE: That is not right, we did the very thing the Commission compelled us to do in rendering the service of the predecessor company under its established procedure, the effect directed by the statute itself under the grandfather rights.

Judge DUFFY: What did you think that phraseology meant?

Mr. BOE: We thought it meant just what the Commission said in the 1948 case when they said the service should be auxiliary to, and it is, and it means the service be integrated into such a system, that is, part by rail and part by motor, but not exclusively because what the White Lines were doing, in addition was this other type of service, and they are now trying to say that it meant exclusively rail service; they didn't say that originally and they recognized that in the restatement.

Judge DUFFY: A picture was drawn of the rail-  
331 roads absorbing these small trucking concerns; your contention is when they gave you the right to purchase the White Lines you received all the White Lines' rights, irrespective of the fact you were a railroad.

Mr. BOE: Yes, sir, and provided that and made the findings required under Section 213 and 5-(2), they made these findings.

Now there is nothing before this Court in this record subsequent to the reopening. They say they reopened it on the present record, on the record in which the Commission originally found it was proper and lawful for the Rock Island Motor Transit Company to acquire these interests.

Judge DUFFY: When you had a chance to make a showing before the Commission, you sat back and didn't do anything, you figured the other side had the burden.

Mr. BOE: The burden of proof, of course, and I think our petition for reconsideration sets that forth quite fully and it is certainly in the language of the Interstate Commerce Commission Act as to the effects of petitions for reconsideration and rehearing, and so on, appearing in Section 179, I will read briefly: "When an application for rehearing, reargument or reconsideration of any decision, order, or requirement of a division, an individual commissioner or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of by the Commission or an appellate division, a suit to enforce, enjoin, suspend or set aside such decision, order or requirement, in whole or in part may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission, but not otherwise."

Judge DUFFY: Well, your five minutes have expired. You will have a chance to file a reply brief. My colleagues suggest and I fully agree with the suggestion that with the briefs filed, both yours and the Commission's, that you accompany them with proposed findings and set forth your viewpoint.

Court will be recessed.

The above and foregoing were all the arguments and other proceedings had upon the hearing of the above entitled and numbered cause.

333 Reporter's Certificate to foregoing transcript omitted in printing.

335 9-28-49 DUFFY, C.J., IGOE AND SHAW, D. J.

In the United States District Court

(Title Omitted)

*Order of Submission—Sept. 28, 1949*

This cause this day coming on for hearing on the motion for a restraining order come the parties by their attorneys, respectively, and hearing is held on the merits, the plaintiff files instant brief in support of its position and it is

ORDERED that the Interstate Commerce Commission be and is hereby granted ten days from this date within which to

file answering brief and that plaintiff and intervenors herein be and are hereby given ten days thereafter within which to file reply briefs and it is

FURTHER ORDERED that counsel for the parties submit proposed findings of fact and conclusions of law with their briefs and disposition of said motion is hereby taken under advisement by the Court.

337 In the United States District Court

(Title Omitted)

*Answer of the United States of America and the  
Interstate Commerce Commission—Filed Sept.  
28, 1949*

Now comes the United States of America, defendant, and for answer to the application or complaint of the intervening plaintiff, The State of Iowa by the Iowa State Commerce Commission, filed in the above-entitled action, admits, denies, and avers as hereinafter set forth.

#### I

Answering paragraph I of the complaint, defendant alleges that such allegations are not within the information of the United States of America and therefore are neither admitted nor denied.

#### II

Defendant admits the allegation of paragraph II.

#### III

Answering paragraph III, defendant admits that the grounds of the complaint of the Rock Island Motor Transit Company are as stated in sections 1, 2 and 3 of paragraph III. Further answering, defendant alleges that the service to be rendered by the Rock Island Transit Company was determined in the original proceeding granting the  
338 authority to operate to be a service auxiliary to and supplemental of rail service and therefore defendant alleges that the order of the Commission dated April 11, 1949, did not modify the certificate as alleged by the complaint in section A of paragraph III but rather restated the type of service for which authority had been granted.

#### IV

Answering the allegations of paragraph IV, defendant alleges that the general motor truck service which intervenor

claims will be eliminated by the order of the Interstate Commerce Commission dated April 11, 1949, was never authorized by the Commission. Defendant further alleges that if the intervener, The State of Iowa, is affected in an adverse manner by said order of the Interstate Commerce Commission, then said intervener has no cause to complain or object to such order since the service being rendered, unless in conformity with the order of April 11, 1949, was without the scope of the operating authority granted to the Rock Island Motor Transit Company.

Defendant United States of America further alleges that the record in the proceedings kept by the Interstate Commerce Commission indicates that copies of the report and order of Division 4, dated April 11, 1949, were sent on April 25, 1949, to the Governors and State Commissions of the following states, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, and Texas. This is the report and order in issue in the case at bar and defendant alleges that transmittal of said copies to the Governor of Iowa and the Iowa State Commission as shown by the record before the Interstate Commerce Commission, constitutes due notice to intervener of said order.

## V

Answering paragraph V of intervener's complaint, defendant denies the allegations therein contained and further, denies that the order of the Interstate Commerce Commission dated April 11, 1949, should be enjoined, annulled or set aside for any of the reasons there stated or for any other reason.

## VI

For further answer to intervening plaintiff's application or complaint, the United States avers that the order herein assailed was made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing, and that this order is lawful and valid in all respects. Defendant denies that said order is invalid for the reasons assigned in intervening plaintiff's application or complaint or for any reason whatsoever.

## VII

Except as herein expressly admitted defendant denies each and every allegation in the complaint contained.

WHEREFORE, defendant prays that the relief prayed for by plaintiff be denied and that the complaint be dismissed, in-

tervening plaintiff to pay the costs, and that the United States have the benefit of such further orders, decrees, or relief as may be just and proper.

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General*

FREDERICK R. HANLON

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*Special Assistant to the Attorney General.*

OTTO KERNER, JR.,

*United States Attorney.*

DANIEL W. KNOWLTON,

*Chief Counsel,*

*Interstate Commerce Commission.*

340 And afterwards on, to wit, the 10th day of October, 1949 there was submitted and received in the Clerk's office of said Court a certain Findings of Fact and Conclusions of Law in words and figures following, to wit:

341 In the United States District Court

(Title Omitted)

*Findings of Fact and Conclusions of Law Submitted by Defendants.*

The above entitled and numbered action having come on to be heard on September 28, 1949, before a duly constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, and all parties being represented by counsel, and the cause having been submitted upon final hearing, and the court having taken the cause under advisement and considered the plead-

ings, the evidence, the argument and briefs of counsel, and the court being fully advised in the premises, now makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. This suit was brought to set aside, annul and enjoin an order of the Interstate Commerce Commission, entered April 11, 1949, in a proceeding entitled *The Rock Island Motor Transit—Purchase—White Line Motor Freight Company, Incorporated, et al.*, Docket No. MC-F-445.

2. Said order of April 11, 1949, modified and clarified the Rock Island Motor Transit Company operating rights acquired by the transaction authorized in Docket No. MC-F-445, and modified the proposed certificate to be issued covering motor common carrier operating rights acquired pursuant to authority granted in Docket No. MC-F-2327 (prior report 39 M. C. C. 824) ordered conditioned in such a manner that operations thereunder be restricted to insure that the motor service rendered in the future shall be limited to that which is auxiliary to, or supplemental of, train service. Other prior reports 5 M. C. C. 451, and 15 M. C. C. 763.

3. The Commission had before it substantial evidence in support of its findings; and this court adopts as its own the statements and findings set forth in the Commission's said report.

#### CONCLUSIONS OF LAW

Upon the foregoing facts, the court makes the following conclusions of law:

1. This court has jurisdiction of this cause and of the parties thereto.

2. The Commission had jurisdiction over the proceedings wherein the said order of April 11, 1949, was made, and had jurisdiction to make the said order.

3. The Commission, in modifying and clarifying the operating rights acquired and authorized in favor of The Rock Island Motor Transit Co. in Docket No. MC-F-445, and the certificate to be issued covering motor common carrier operating rights acquired pursuant to authority granted in MC-F-2327 (prior report 39 M. C. C. 824), conditioned in such a manner as to subject the motor common carrier operations thereunder to stated restrictions calculated to insure that the motor carrier service rendered in the future shall be limited to that which is auxiliary

343 to, or supplemental of train service. The certificate of authority issued under the above proceedings (Docket Nos. MC-F-448, 5 M.C.C. 451 and 15 M.C.C. 763) contained a specific reservation that said certificate was subject to further restrictions and limitations to limit the service thereunder to that which is auxiliary to or supplemental of train service, which reservation is lawful as provided for under Section 5 (formerly Section 213) and 208 of the Interstate Commerce Act; and further the order entered in the proceedings, No. MC-F-2327, *The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson*, was reopened for the purpose of considering and deciding the specifications in the certificate to be issued, of the service to be rendered, particularly limiting and restricting the service to that which is auxiliary to or supplemental of train service as authorized by the above sections of the Act.

4. Said order was within the statutory authority of the Commission and was not arbitrarily or capriciously made or based upon mistake of law or misapplication of proper statutory standards. Said order was made by the Commission after full hearing, upon adequate findings supported by substantial evidence, and in accordance with the applicable law, and was valid and lawful in all respects.

5. The relief prayed for in the complaint is denied, and the complaint dismissed, plaintiff to pay the costs.

This ..... day of October, 1949.

F. RYAN DUFFY  
*United States Circuit Judge,  
Seventh Judicial Circuit*

MICHAEL L. IGOE  
*United States District Judge for the  
Northern District of Illinois*

ELWYN R. SHAW  
*United States District Judge for the  
Northern District of Illinois*

345

In the United States District Court  
For the Northern District of Illinois,  
Eastern Division

Civil Action No. 49-C-1005.

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF,  
v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS.

*Memorandum Opinion—Filed Nov. 29, 1949.*

By this complaint plaintiff seeks to set aside, annul and enjoin an order of the Interstate Commerce Commission by which it is proposed to modify certificates of public convenience and necessity issued and to be issued to plaintiff as a motor common carrier of property in interstate commerce. This suit is brought under Sections 1336, 2284, 2322, 2323, and 2325, Title 28, United States Code. The State of Iowa by the Iowa State Commerce Commission, and the Omaha Chamber of Commerce, a non-profit organization composed of shippers, manufacturers and wholesalers located at Omaha, Nebraska, were granted leave to intervene (Section 2323, Title 28, United States Code), and they appear in support of the complaint. The Court has jurisdiction of the parties and subject-matter. It has had the benefit of evidence consisting of transcripts of the record of proceedings before the Commission in the cases, out of which the challenged order comes, as well as other pertinent proceedings before that agency.

This complaint presents the question whether the Commission has the power, apart from Section 212 of the Interstate Commerce Act, materially to change or modify—in effect partially to revoke—certificates and operating rights lawfully acquired in appropriate proceedings under

346 Section 213 of the Motor Carrier Act of August 9, 1935, 49 Stat. L. 543, and Section 5(2)(a)(b) of the

Interstate Commerce Act. The Commission makes no claim that it is here acting under Section 212, and the Court so finds. As a common carrier by motor vehicle plaintiff has been and now is transporting property over the highways in and between the states of Illinois, Iowa, and Nebraska, among other states. This service results from certificates and operating rights purchased in April, 1938, by plaintiff from White Line Motor Freight Company and White Line Trucking Company of Des Moines, Iowa. These companies were motor common carriers possessed of routes between

Chicago, Illinois, and Omaha, Nebraska, and many intermediate points, with segments extending to Cedar Rapids and Muscatine, Iowa. In November, 1943, plaintiff also purchased the certificate and operating rights of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son, this partnership being a motor common carrier with a route located in western Iowa extending to Omaha, Nebraska. All points located on the White Line and Frederickson routes were stations on the line of railroad of Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad. At all times here involved plaintiff is and was a subsidiary of that railroad and predecessors in interest. Both plaintiff, as successor in interest to the White Line companies, and Fredericksons on their own account, had "grandfather" rights under a proviso in Section 206(a) of the Motor Carrier Act of August 9, 1935, 49 Stat. L. 551. Certificates in accordance therewith were issued in due course to plaintiff, as successor to the White Line companies, and to the Fredericksons.<sup>1</sup>

In October, 1937, plaintiff entered into an agreement to acquire the certificates, operating rights, equipment 347 and terminal facilities, and good will of the White Line companies. As this transaction was subject to the approval of the Interstate Commerce Commission plaintiff filed its application<sup>2</sup> with the Commission. The application was assigned to an Examiner for hearing and on February 12, 1938, the Examiner issued his recommended report and order, recommending approval of the transaction subject to conditions among which was a condition that the plaintiff's motor operation be restricted to the rail rates and bills of lading of plaintiff's railroad affiliate. Plaintiff filed exceptions to this restriction, pointing out that its proposed method of operation included not only service auxiliary to its railroad affiliate, but also a motor common carrier service at motor rates similar to that rendered by its predecessors in interest. In its exceptions plaintiff advised the Commission that it would not go through with the transaction unless this restriction were eliminated. On April 1, 1938, the Commission entered a

<sup>1</sup> ICC No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Company, Common Carrier Application, ICC Nos. MC-530 and MC-530; Sub. No. 1.—Application of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son.

<sup>2</sup> ICC Docket No. MC-F-445, The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Inc., *et al.*

report and order by which it approved the transaction, making the statutory findings required by Section 213 of the Motor Carrier Act of August 9, 1935, which became Part II of the Interstate Commerce Act, 49 Stat. L. 543. It eliminated the objectionable restriction from its order. With the Commission's authorization therefore the transaction was consummated, and plaintiff commenced operating upon the White Line routes on April 5, 1938, rendering a service at "all-motor" rates as a common carrier by motor vehicle and also a service coordinated with its affiliated railroad. As a condition precedent to consummation, and as required by the Commission's tariff publishing regulations issued under Sections 216 and 217 of Part II of the Interstate Commerce Act, plaintiff was obliged to and it did adopt the "all-motor" tariffs and rates of its predecessors in interest. Since April 5, 1938, plaintiff has continuously engaged in such operations. With respect to the

348 Frederickson route plaintiff entered into an agreement to acquire this partnership's certificate of public convenience and necessity and operating rights, and on September 29, 1943, filed its application<sup>3</sup> with the Commission for approval of the transaction under Section 5(2)(a)(b) of the Interstate Commerce Act, 54 Stat. L. 905. Section 213 of Part II had in the meantime been repealed by the Transportation Act of September 1, 1940, 54 Stat. L. 919; and its substance was re-enacted into Section 5(2)(a)(b). As in the White Line case, plaintiff advised the Commission that it proposed to conduct a trucking service on the Frederickson route auxiliary to the affiliated railroad and also a service at all-motor tariffs and rates similar to that conducted by the Fredericksons. On November 28, 1944, the Commission approved the Frederickson transaction without any restrictions. On January 22, 1945, plaintiff consummated the transaction, and since that time plaintiff has operated continuously upon the Frederickson route and unified that route with the White Line route acquired pursuant to the Commission's order of April 1, 1938. As in the White Line proceeding, the Commission's order of November 28, 1944, in the Frederickson proceeding made the statutory findings required by Section 5(2)(a)(b) of the Interstate Commerce Act. It provided further that plaintiff was entitled to the certificate of public convenience and necessity previously granted to the

<sup>3</sup> ICC Docket No. MC-F-2327, The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson.

Fredericksons, and that the operating rights evidenced by said certificate could be unified with rights otherwise confirmed in plaintiff. In reliance upon the Commission's orders of April 1, 1938, and November 28, 1944, plaintiff paid the respective purchase prices of \$59,400.00 and \$6500.00 called for by its agreements, and also committed itself to large expenditures in the development of its business.

349 The order here challenged affirms the Commission's report and order of March 4, 1946,<sup>4</sup> by which the Commission upon its own motion in the acquisition proceedings referred to and on present records proposes materially to modify plaintiff's certificates by means of the imposition of new restrictions, as follows: (1) that henceforth plaintiff is without authority to perform service under "all-motor" local and "all-motor" joint rates with connecting motor carriers, and (2) that plaintiff shall not transport any shipments between any of the following points, or through or to or from more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois—this restriction being known as a "key-point" restriction. The first restriction would limit plaintiff's operations to the railroad rates and billing of its railroad affiliate, and the key-point restriction would substantially limit its physical operations and place added burdens on those that remain. The net effect would be materially to impair and destroy the value of the operating rights acquired by plaintiff from the White Line companies and Fredericksons. This action reflects a change of policy as stated or expressed by the Commission in Texas & Pacific M. Transport Co. Com. Car. Application, 41 M. C. C. 721, to which repeated reference has been made in the report on reopening of March 4, 1946, and the one now challenged of April 11, 1949. As regards plaintiff and as applied to it, this change of policy came eight years after it had consummated the White Line transaction, and more than

<sup>4</sup> Commissioners Mahaffie, Miller, and Porter (now deceased) dissented to the report and order of March 4, 1946. Commissioners Mahaffie and Miller again dissented to the action reflected by the report and order of April 11, 1949, and Commissioner Mitchell (who succeeded Commissioner Porter) has also dissented. Commissioner Lee in Kansas City Southern, etc. 28 M. C. C. 5, and Commissioner Rogers in Rock Island Motor, etc., 33 M. C. C. 349, expressed views in agreement with plaintiff's contention that the term, "auxiliary to and supplemental of train service," did not foreclose plaintiff from conducting "all-motor" service, which the order of April 11, 1949, would now prohibit.

350 a year after consummation of the Frederickson transaction. The report and order of March 4, 1946, were the first notice that plaintiff had that this new policy would be applied to it in connection with the certificates acquired by plaintiff in the White Line and Frederickson proceedings.

The operating rights acquired by plaintiff, and the certificates evidencing such rights, obtained in pursuance of the final orders of the Commission of April 1, 1938, in Docket No. MC-F-445, and November 28, 1944, in Docket No. MC-F-2327, are in the nature of franchise rights and can only be changed or revoked as provided by law. The condition in the White Line order of April 1, 1938, as carried into the certificate of December 3, 1941, issued to plaintiff, that the authority granted shall be subject to such further limitations, restrictions, or modifications as may be found necessary in order to insure that the service shall be auxiliary or supplementary to train service, would not be adequate to change or deprive plaintiff of these vested rights. The fact is that plaintiff's operation is and has been auxiliary or supplementary to train service within the definition expressed by the Commission and as understood by plaintiff in April, 1938, when the rights and operating authorities of its predecessors, White Lines, became vested in plaintiff. So far as the Frederickson rights are concerned, no such condition was contained in the Commission's order of authorization of November, 1944. The only basis for a change or revocation in whole or in part of plaintiff's rights must be found in Section 212(a), Part II of the Interstate Commerce Act, 49 Stat. L. 555, 49 U. S. C., Section 312(a). *U. S. and I. C. C. v. Seatrain Lines*, 329 U. S. 424; *Boulevard Transit Lines v. U. S. et al.*, 77 Fed. Supp. 594; *Smith Bros. Revocation of Order*, 33 M. C. C. 465. No such basis is here present or shown.

351 Plaintiff is a common carrier by motor vehicle within the definition of Paragraph 14 of Section 203(a) of Part II of the Interstate Commerce Act. That paragraph provides:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in transportation by motor vehicle \* \* \* of property \* \* \* for compensation."

The Supreme Court has had occasion to recognize and give full weight to the statutory definition, as for example in *U. S. v. Carolina F. C. Corporation*, 315 U. S. 475, at page 483, where the Court said:

"As we have noted a 'common carrier by motor vehicle' was defined in Section 203(a)(14) as one who 'undertakes' to transport 'passengers or property, or any class or classes of property for the general public'."

In the instant case the Commission by its report and order of April 11, 1949, assumes that it is authorized<sup>3</sup> to burden plaintiff's certificate with the restrictions noted. There is nothing in the legislative history<sup>5</sup> of the Motor Carrier Act referred to by defendants to indicate that Congress intended the Commission to deal with plaintiff because of its railroad affiliation in acquisition cases, such as are now before the Court, beyond the findings required by Section 213 of the Motor Carrier Act of 1935 and its re-enacted provisions in Section 5(2)(a)(b) of the Interstate Commerce Act. Those findings were appropriately made in the Commission's orders of April 1, 1938, in MC-F-445, and November 28, 1944, in MC-F-2327, and represented 352 finality of action. *Seatrains Lines, Inc. v. United States*, 64 Fed. Supp. 156; affirmed in 329 U. S. 424. The proposed restrictions would materially change the character of plaintiff's operating authority and impair its ability to fulfill the obligations of a common carrier as defined in Section 203(a)(14). The restrictions are repugnant to the express provisions of the Statute. *U.S. v. Carolina Freight Carrier Corp.*, 315 U. S. 475.

As the operating rights acquired by plaintiff in pursuance of the orders of April 1, 1938, and November 28, 1944, were "grandfather" rights authorized by a proviso of Section 206(a) of the Motor Carrier Act, the impropriety of attempting to engraft limitations of the sort contemplated by the order of April 11, 1949, is manifest. In *U. S. v. Carolina Freight Carrier Corp.*, 315 U. S. 475, the Court

<sup>3</sup> In hearings before the Congressional Committee on the coordinator's Draft of Bill, Frank McManamy, Chairman of the Legislative Committee of the Interstate Commerce Commission, stated that it was the unanimous recommendation of the Commission that railroads, "like anyone else" should be given certificates of convenience and necessity to operate competing bus and truck lines "in order to coordinate the different means of transportation and get the best out of all of them." (Hearings on H. R. 6836 before Legislative Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, pages 16 and 22.) Commissioner Eastman explained to the committee that his bill would permit a railroad to own bus and truck lines and to coordinate these different forms of transportation under one management. (Hearings on S 1629, S 1632, and S 1635, before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Part I, page 85.)

had before it, as in these proceedings, the acquisition of "grandfather" rights from a predecessor in interest. Operations were shown to be common carrier in nature but over irregular routes in a designated territory. In granting the certificate the Commission sought to limit carriage of certain commodities to certain specified points. The Court struck down the restriction saying (page 486):

"If the applicant had established that it was a 'common carrier' for a group of commodities or for an entire class or classes of property and was in 'bona fide operation' during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. \* \* \* Presumptively one who had established his status of 'common carrier' would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipments of any articles were authorized." \* \* \* (Page 488.) "But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure."

353 The Supreme Court recognized the gravity of such restrictions on common carrier operations:

(Page 488.) "To appellee such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. \* \* \* (Such) A restriction \* \* \* is a patent denial to appellee of that 'substantial parity between future operations and prior bona fide operations' which the Act contemplates."

The last quoted passage highlights the unlawfulness of the Commission's attempt to impose on plaintiff's certificates covering purchased operating rights conditions which are inconsistent with plaintiff's common carrier status and which cut down its right to exercise the privilege granted to plaintiff and predecessors in interest.

In *Alton R. Co., et al. v. U. S.*, 315 U. S. 15, the Supreme Court again had occasion to consider the nature of operating rights which must under the statute be conferred by a certificate. The Court spoke of " \* \* \* creating that sub-

stantial parity between future operations and prior bona fide operations which the statute contemplates."

In the instant proceeding the Commission by its orders of April 1, 1938, and November 28, 1944, made the statutory findings that plaintiff's acquisition of the certificates and operating rights of White Lines and Fredericksons was consistent with the public interest and would not result in any undue restraint of competition. Plaintiff having acquired the "grandfather" operating rights to which the White Line companies and Fredericksons were initially entitled, the Commission had no lawful power to diminish those rights at some later date since those rights had become vested in plaintiff, as successor in interest, except as such power may be otherwise provided by statute. That power is delimited with precision in Section 212 of the Act and only in Section 212. Defendants make no claim in the instant case that the Commission's action reflected by its order of April 11, 1949, is premised upon any authority conferred by Section 212.

354 The Commission, being an agency of limited powers and authority, may not exceed its statutory powers. *United States v. Pennsylvania R. Co.*, 242 U. S. 208. Justification for the Commission's exercise of its administrative processes and authority must be found in some express provision of the Interstate Commerce Act, of which the Motor Carrier Act is now a part as Part II. The Commission has recognized this elementary proposition in *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465, where it thus expressed itself:

"The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication, but should be conferred in clear and unmistakable terms. \* \* \* We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the Act. *Wisconsin R. Comm. v. Chicago & N. W. Ry. Co.*, 87 I. C. C. 195."

It is apparent that the proceedings covered by the order of April 11, 1949, were reopened to execute a new policy as expressed in the Texas & Pacific case, and that the Commission failed to observe these recognized limitations. Where, as here, the action of the Commission in the reopened proceedings results in a material change in plaintiff's certificates and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute. *I. C. C. v. Seatrains Lines*, 329 U. S. 424; *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *I. C. C. v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479. No such power is apparent from this record, and this is not a proceeding under Section 212 of the Interstate Commerce Act.

355 The purchase price of the White Line rights was \$59,400.00, and the purchase price for the Frederickson rights was \$6500.00. Upon the consummation of the White Line deal on April 5, 1938, plaintiff proceeded to operate and develop the White Line routes. It alleges that of the order of April 11, 1949, should become effective, it stands to lose gross revenue in excess of a million dollars per year. Plaintiff's certificates and operating authorities are rights with very definite value. The Commission's action represented by the order of April 11, 1949, in revoking a substantial portion of plaintiff's certificates and operating authorities will destroy or materially impair their value. Certificates such as here involved and the rights which they confer are property of value. *City of Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Seatrains Lines v. U. S.*, 64 F. Supp. 156, 161; *Crescent Express Lines v. U. S.*, 49 F. Supp. 92; *Capitol City W. P. & M. Co., Inc.*, 12 M. C. C. 79. Such rights are entitled to constitutional protection. *Frost v. Corporation Commission*, 278 U. S. 515; *United States v. Seatrains Lines, Inc.*, 329 U. S. 424. The Commission's order violates the Fifth Amendment to the United States Constitution.

The reports and orders of the Interstate Commerce Commission entered respectively on March 4, 1946, and April 11, 1949, are set aside and annulled, and permanently enjoined.

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In the  
United States District Court  
For the Northern District of Illinois,  
Eastern Division.

Civil Action No. 49-C-1005.

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF,  
v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS.

*Findings of Fact—Nov. 29, 1949*

The ultimate or relevant facts are found as follows:

1. Plaintiff, The Rock Island Motor Transit Company, is a corporation organized and existing under the laws of the State of Illinois, and is a common carrier by motor vehicle engaged in the transportation of property in intra and interstate commerce, among other places transporting property over the highways in interstate commerce in and between the states of Illinois, Iowa, and Nebraska, and has been so engaged since April 5, 1938.

2. Plaintiff is and heretofore has been a wholly-owned subsidiary of Chicago, Rock Island and Pacific Railroad Company and of its predecessors in interest. Chicago, Rock Island and Pacific Railroad Company is and its predecessors in interest were common carriers by railroad.

3. White Line Motor Freight Company, Inc., and White Line Trucking Company (White Lines) were affiliated trucking companies operating as common carriers of property by motor vehicle. So far as the rights involved in this proceeding are concerned, White Lines operated over a route or routes paralleling generally the line of Chicago, Rock Island and Pacific Railroad Company between 358 Silvis, Illinois, and Omaha, Nebraska, and between points intermediate thereto, including such points as Moline and Rock Island, Illinois, and Davenport, Iowa City, Newton, Des Moines, Atlantic and Council Bluffs, Iowa, all of which were and are points located upon lines of railroad of Chicago, Rock Island and Pacific Railroad Company. After June 1, 1935, the operations of White Lines as common carriers of property by motor vehicle were pursuant to "grandfather" applications filed with the Interstate Commerce Commission and pending at the time the transaction hereinafter described was consummated.

4. In October, 1937, plaintiff entered into purchase agreements which, upon consummation, would result in acquisition by plaintiff of the physical properties and operating rights of White Lines between Chicago and Omaha. The agreed purchase price to be paid by plaintiff was the sum of \$59,400.00. The proposed transaction was subject to the approval of the Interstate Commerce Commission under Section 213 of the Motor Carrier Act of August 9, 1935, U. S. Code, Title 49, Section 313.

5. In October, 1937, plaintiff filed its application with the Interstate Commerce Commission for authority to acquire the operating rights and properties of White Lines. The application was docketed as No. MC-F-445 and assigned to an Examiner of the Interstate Commerce Commission for hearing. After hearing, on February 12, 1938, the Examiner filed a proposed report and order recommending that the transaction be approved subject, among other conditions not here pertinent, to the following conditions:

(1) That applicant shall not render service from or to, or interchange traffic at, any point other than The Chicago, Rock Island and Pacific Railway Company, and shall be subject to such further limitations as may hereafter be found necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition; and

(2) That no truck service shall be conducted at other than rail rates.

359 6. Plaintiff filed exceptions to the Examiner's recommended report and order, taking particular exception to the imposition of condition number 2 above that no truck service should be conducted at other than rail rates. In its Brief of Exceptions plaintiff advised the Interstate Commerce Commission that, among other types of service, plaintiff proposed to utilize the operating rights of White Lines in the conduct of an all-truck service confined to points on the railroad "but in addition to rather than a substitute for rail service"; that any prohibition against the conduct of truck service at other than rail rates would so substantially impair the value to plaintiff of the operating rights and physical properties sought to be acquired as to question the propriety of the investment to which plaintiff had tentatively been committed; and that if the authority granted were so restricted as

not to permit truck service at motor common carrier rates plaintiff would abandon the transaction.

7. Thereafter, on April 1, 1938, the Interstate Commerce Commission issued its report and order. Upon prescribed conditions set forth in the report, the purchase by plaintiff of the common-carrier operating rights of White Lines between Chicago and Omaha, including similar rights over branch routes to Muscatine and Cedar Rapids, and of the physical properties of White Lines, thereby was approved and authorized. The said prescribed conditions did not include condition number 2, recommended by the Examiner to which plaintiff had objected "that no truck service shall be conducted at other than rail rates." The Commission eliminated that condition and the report and order did not set forth any such restriction. And, following the issuance of the report and order, plaintiff was required by the Commission, upon consummation of the proposed transaction, to adopt the motor common carrier rates and tariffs of White Lines.

8. Pursuant to said requirement plaintiff, effective April 5, 1938, adopted the motor common carrier rates and 360 tariffs of White Lines in the form and manner prescribed by the rules of the Interstate Commerce Commission, and since that time and at present plaintiff, in the conduct of motor carrier operations, has been and is applying and observing said motor common carrier rates and tariffs as modified and amended from time to time.

9. In connection with the conduct of truck service from or to, or the interchanging of traffic at, any point not a station on the railroad, plaintiff had advised the Commission in its Brief of Exceptions and theretofore that plaintiff was agreeable to abandonment of all rights except common-carrier operating rights at stations on the railroad between Omaha, Nebraska and Chicago, Illinois, and similar rights over branch routes to Muscatine and Cedar Rapids, Iowa. In its report and order of April 1, 1938, the Commission referred to this commitment by plaintiff and thereupon stated that "the 'grandfather' applications of White Lines will be considered as amended accordingly."

10. In its report and order of April 1, 1938, the Commission made the following findings, among others:

(a) that the purchase by plaintiff of the common-carrier operating rights of White Lines between Omaha and Chicago, and similar rights over branch routes to Muscatine and Cedar Rapids, including the right to operate pending determination of the "grand-

father" applications, and the right to any certificates which may be issued as a result of said applications, will promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(b) that plaintiff shall not render service from or to, or interchange traffic at any point other than a station on the lines of said Railroad.

(c) that the conditions of Section 213 have been or will be fulfilled.

361 11. Relying upon the report and order of the Commission authorizing plaintiff to acquire the physical properties and common-carrier operating rights of White Lines between Omaha and Chicago, including similar rights over branch routes to Muscatine and Cedar Rapids, and upon the significant fact that the Commission did not impose as a condition of its approval the restriction recommended by the Examiner to which plaintiff had excepted, namely, "that no truck service shall be conducted at other than rail rates," plaintiff paid over the purchase price and the transaction was consummated on April 5, 1938.

12. After the issuance of the Commission's report and order of April 1, 1938, approving the White Lines transaction, plaintiff became the applicant in the then pending "grandfather" applications of White Lines. On August 5, 1938, the Commission entered an order that a Certificate of Public Convenience and Necessity shall be issued authorizing plaintiff to engage in interstate and foreign commerce as a common carrier by motor vehicle of commodities generally (except commodities in bulk, etc.) over the routes and between the points therein specified.

13. On December 3, 1941, the Commission issued its certificate covering the route between Silvis, Illinois, and Omaha, Nebraska, (among others), in conformity with its report and order of April 1, 1938, approving and authorizing the White Lines transaction.

14. The authority granted by the aforementioned certificate and order, like the authority granted by the report and order of April 1, 1938, approving the purchase of White Lines common-carrier operating rights, was not subjected to the restriction recommended by the Examiner to which plaintiff had objected "that no truck service shall be conducted at other than rail rates."

362 15. J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son (Fredericksons), was a partnership operating as a common carrier of property by motor vehicle. So far as the rights involved in this proceeding are concerned Fredericksons operated over a route or routes paralleling generally the lines of Chicago, Rock Island and Pacific Railroad Company between Omaha, Nebraska, and Atlantic, Iowa, and that railroad's branch lines extending to Avoca, and Harlan, Iowa, and between intermediate points located on said railroad. Fredericksons were possessed of a "grandfather" certificate.

16. On August 23, 1943, plaintiff entered into a purchase agreement which upon consummation would result in acquisition by plaintiff of certain truck equipment and the certificate and operating rights possessed by Fredericksons. The agreed purchase price to be paid by plaintiff was the sum of \$6500.00. The proposed transaction was subject to the approval of the Interstate Commerce Commission under Section 5(2)(a)(b) of the Interstate Commerce Act.

17. In September, 1943, plaintiff filed its application with the Interstate Commerce Commission to acquire said certificate and operating rights, and equipment of Fredericksons. The application was docketed as No. MC-F-2327, and assigned to an Examiner of the Interstate Commerce Commission for hearing. An Examiner's report was waived and on November 28, 1944, Division 5 issued its report and order approving the transaction. Plaintiff was required by the Commission, upon consummation of this transaction, to adopt the motor carrier rates and tariffs of Fredericksons. By said report and order it was also stated that plaintiff would be entitled to a certificate covering the operating rights acquired and as granted to Fredericksons, which rights were authorized to be unified with the rights otherwise confirmed in plaintiff.

363 18. Plaintiff consummated the Frederickson transaction effective January 22, 1945; it adopted the motor common carrier rates and tariffs of Fredericksons in the form and manner prescribed by the rules of the Interstate Commerce Commission, and since that time and at present plaintiff, in the conduct of motor carrier operations, has been and is applying and observing said motor common carrier rates and tariffs as modified from time to time.

19. Relying upon the report and order of the Commission authorizing plaintiff to acquire the common carrier operating rights and properties and equipment of Freder-

icksens between Atlantic, Iowa, and Omaha, Nebraska, and intermediate points and between Harlan and Avoca, Iowa, and intermediate points located on the Chicago, Rock Island and Pacific Railroad, plaintiff paid over the purchase price and consummated the transaction on January 22, 1945.

20. Upon consummation of the transactions authorized by the Commission's orders of April 1, 1938, and November 28, 1944, and continuously since, plaintiff engaged and has engaged in the following methods of operation: (a) a coordinated rail motor service at rail rates auxiliary to the existing railway service of its railroad affiliate; (b) a motor carrier service in substitution of rail service, at rail rates; and (c) a motor carrier service at motor common carrier rates.

21. In its reports and orders of April 1, 1938, in Docket No. MC-F-445, and of November 28, 1944, in Docket No. MC-F-2327, the Commission made the statutory findings required by Section 213 of the Motor Carrier Act of 1935, and Section 5(2)(a)(b) of the Interstate Commerce Act; i. e.: that these transactions were within the scope of said sections and were being concluded upon just and reasonable terms; that the transactions would promote the public interest by enabling plaintiff's railroad affiliate to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition.

364 ENTERED at Chicago, Illinois, November 29, 1949.

F. RYAN DUFFY

*Judge, United States Court of Appeals,  
7th Circuit*

M. L. IGOE

*District Judge, United States District  
Court, Northern District of Illinois,  
Eastern Division*

ELWYN R. SHAW

*District Judge, United States District  
Court, Northern District of Illinois,  
Eastern Division*

365

In the United States District Court  
For the Northern District of Illinois,  
Eastern Division.

Civil Action No. 49-C-1005.

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF,  
v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS.

*Conclusions of Law—November 29, 1949*

We conclude as matters of law:

1. This Court has jurisdiction of the parties and the subject matter of this suit.

2. The certificates, operating rights, and privileges which plaintiff was authorized to purchase from White Lines and Fredericksons, included the right to engage in the following forms of trucking service upon the routes acquired: (a) a coordinated rail-motor service at rail rates auxiliary to the existing service of plaintiff's, affiliated railroad; (b) a motor service in substitution of rail service, at rail rates; and (c) a motor common carrier service at tariffs observed and applied by plaintiff's predecessors as modified from time to time.

3. Prior to and at the time of the approval of the White Line transaction and the issuance in said proceeding of plaintiff's certificate, and at the time of the approval of the acquisition of the Frederickson certificate, the term, "auxiliary to and supplemental of train service" did not prohibit the rendition of all-motor service directly for the shipping public at all-motor rates in addition to service at rail rates in substitution for and in lieu of the rail service of plaintiff's affiliated railroad.

4. The Interstate Commerce Commission by its report and order of April 11, 1949, erred in finding that plaintiff is without authority to perform service under all-motor local and all-motor joint rates with connecting carriers, and that plaintiff is without authority to enter into joint rates with other motor carriers. Such a restriction in plaintiff's certificates and operating rights would be a substantial diminution of plaintiff's certificates and operating authority, and constitutes a taking of plaintiff's property without due process of law.

5. The Commission's action, in imposing a key-point restriction that no shipments shall be transported by plaintiff between specified points or through or to or from more than one of said points, is unlawful. Such a restriction constitutes a substantial diminution of plaintiff's certificates and operating rights; it constitutes in whole or in substantial part a revocation of plaintiff's certificates and lawfully acquired operating rights, and would amount to a taking of plaintiff's property without due process of law.

6. The reopening and consideration on the Interstate Commerce Commission's own motion as evidenced by its reports and orders of March 4, 1946, and April 11, 1949, were unlawful and without statutory authority.

7. The certificates and operating rights acquired by plaintiff from White Lines and Fredericksons comprise property and franchise rights and the Interstate Commerce Commission erred in ordering a substantial modification and diminution thereof. Such action would deprive plaintiff of its property without due process of law contrary to the Fifth Amendment of the United States Constitution.

8. The reports and orders of March 4, 1946, and April 11, 1949, substantially modify and eliminate rights lawfully acquired from predecessors in interest, and vested in plaintiff.

367 9. The Interstate Commerce Commission is an agency of limited powers and authority and may not exceed its statutory powers. The order of April 11, 1949, evidences an exercise of power beyond the powers and authority delegated to the Interstate Commerce Commission.

10. The Commission is without authority to modify or revoke a certificate once it has been issued, unless it comes within one of the provisions of Section 212(a) of Part II of the Interstate Commerce Act, 49 U. S. C. A., Section 312(a).

11. There is here present no condition that would bring the instant case within Section 212(a) of Part II of the Interstate Commerce Act, 49 U. S. C. A., Section 312(a).

12. Plaintiff will be irreparably damaged by said report and order of April 11, 1949, in that by denying it the right to transport traffic at all-motor rates as a common carrier by motor vehicle and restricting it to key-point service as proposed, plaintiff will lose substantial revenues, and such action of the Commission will destroy and im-

pair plaintiff's substantial investments in property of value, contrary to law.

Entered at Chicago, Illinois, November 29, 1949.

F. RYAN DUFFY  
*Judge, United States Court  
of Appeals, 7th Circuit*

M. L. IGOE,  
*District Judge, United States District Court,  
Northern District of Illinois, Eastern Division*

ELWYN R. SHAW  
*District Judge, United States District Court,  
Northern District of Illinois, Eastern Division*

369 In the United States District Court  
For the Northern District of Illinois  
Eastern Division

Civil Action No. 49-C-1005.

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF,  
v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS.

*Judgment—November 29, 1949*

This cause came on to be heard on the 28th day of September, 1949, on plaintiff's complaint praying for a temporary restraining order, an interlocutory injunction and a permanent injunction, and a prayer that the reports and orders of the Interstate Commerce Commission entered respectively on March 4, 1946, and April 11, 1949, by the Interstate Commerce Commission in proceedings before it numbered and entitled Dockets MC-F-445, The Rock Island Motor Transit Company-Purchase-White Line Motor Freight Company, Inc., *et al.*; MC-F-2327, The Rock Island Motor Transit Company-Purchase-J. H. Frederickson and D. H. Frederickson; and No. MC-29130 (formerly No. 49147), The Rock Island Motor Transit Company, Common Carrier Application, be set aside, annulled, and enjoined; the State of Iowa, by the Iowa State Commerce Commission, and the Omaha Chamber of Commerce having intervened in support of the plaintiff's complaint, and the defendants having filed answers to the complaint, and the petitions of intervention filed by said interveners; and the Court having heard the evidence and oral argument of counsel, and having examined the briefs filed by counsel, and the court being fully advised in the premises.

370 Now Therefore, It is Ordered, Adjudged, and Decreed by the Court:

(1) That the reports and orders of the Interstate Commerce Commission decided and entered respectively on March 4, 1946, and April 11, 1949, the effective date of which has been extended to December 1, 1949, in proceedings under Dockets MC-F-445, The Rock Island Motor Transit Company-Purchase-White Line Motor Freight Company, Inc., *et al.*; MC-F-2327, The Rock Island Motor Transit Company-Purchase-J. H. Frederickson and D. H. Frederickson; and No. MC-29130 (formerly No. 49147, The Rock Island Motor Transit Company, Common Carrier Application), be and they are hereby set aside, annulled, and enjoined; and

(2) That the defendants, their agents and attorneys, be and they hereby are permanently enjoined from enforcing or attempting to enforce the aforesaid reports and orders.

Entered at Chicago, Illinois, November 29, 1949.

F. RYAN DUFFY  
*Judge, United States Court  
of Appeals, 7th Circuit*

M. L. IGOE  
*District Judge, United States District Court,  
Northern District of Illinois, Eastern Division*

ELWYN R. SHAW,  
*District Judge, United States District Court,  
Northern District of Illinois, Eastern Division*

372 In the United States District Court

(Title Omitted)

*Petition for Appeal—Filed Jan. 27, 1950*

The United States of America and Interstate Commerce Commission, defendants in the above-entitled cause, feeling themselves aggrieved by the final decree and order of this Court entered on November 29, 1949, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the Assignment of Errors accompanying this petition, to which reference is hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and

entered, duly authenticated, be transmitted to the Supreme Court of the United States under the rules of said Court.

Dated January 26, 1950.

373

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*Assistant Attorney General*

WILLIAM D. MCFARLANE

William D. McFarlane  
*Special Assistant to the Attorney General*

FREDERICK R. HANLON

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Otto Kerner, Jr.  
*United States Attorney  
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DANIEL W. KNOWLTON

Daniel W. Knowlton  
*Chief Counsel*

ALLEN CRENSHAW

Allen Crenshaw  
*Assistant Chief Counsel  
For the Interstate Commerce Commission*

375

In the United States District Court

(Title Omitted)

*Order Allowing Appeal—Jan. 27, 1950*

In the above-entitled cause the United States of America and the Interstate Commerce Commission, defendants, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in these causes entered on November 29, 1949, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules in such case made and provided:

IT IS ORDERED AND DECREED, that the appeal be and the same is hereby allowed as prayed for.

Dated January 27, 1950.

IGOR

*United States District Judge*

377

In the United States District Court  
(Title Omitted)

*Notice of Appeal—Filed Jan. 27, 1950*

(The Rock Island Motor Transit Company

To: (State of Iowa *ex rel.* Iowa State Commerce Com-  
mission

♥ (Omaha Chamber of Commerce

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, and each of them do here by appeal to the Supreme Court of the United States from the final order and decree of the United States District Court for the Northern District of Illinois, Eastern Division, made and entered on the 29th day of November, 1949, setting aside the reports and orders of the Commission of March 4, 1946, and April 11, 1949, in Docket Nos. MC-F-445 and MC-F-2327, 40 M. C. C. 457, 55 M. C. C. 567 respectively, wherein the Commission entered orders placing certain conditions on certain of the certificates of the Rock Island Transport Company.

378

Dated January 26, 1950.

HERBERT A. BERGSON

Herbert A. Bergson  
*Assistant Attorney General*

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*Special Assistant to the Attorney General*

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DANIEL W. KNOWLTON

Daniel W. Knowlton  
*Chief Counsel*

ALLEN CRENSHAW

Allen Crenshaw  
*Assistant Chief Counsel  
For the Interstate Commerce Commission*

(Title Omitted)

*Assignment of Errors and Prayer for Reversal—  
Filed Jan. 27, 1950*

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered on November 29, 1949.

The District Court erred:

1. In holding that the Commission did not have authority under Sections 5, 17, 207, 208, and 221 of the Interstate Commerce Act to impose specific conditions confining appellee to motor service which was supplemental and auxiliary to rail service by the supplementary proceedings involved here.

2. In holding and concluding that the condition on the original certificate that the authority granted shall be subject to such further limitations, restrictions, or modifications as may be found necessary in order to insure that the service shall be auxiliary or supplementary to  
381 train service, would not be adequate authority for placing the later, more specific, conditions on the certificates here involved.

3. In failing to hold and conclude that the condition forbidding to plaintiff the right to perform service under "all-motor" local and "all-motor" joint rates with connecting motor carriers was merely a redefinition of the authority originally granted and was an expression of the consistent policy of the Commission in respect to railroad-owned motor carriers.

4. In holding and concluding that the report and order of March 4, 1946, were the first notice that plaintiff had that this "new" policy would be applied to it in connection with the certificate acquired by plaintiff in the *White Line* and *Frederickson* proceedings.

5. In failing to hold and conclude that from the time of issuance of the original certificates that the plaintiff was on notice as to the type of service it was to perform, namely, a service supplemental to and auxiliary of the rail service.

6. In holding and concluding that the effect of the action of the Interstate Commerce Commission in placing the restriction "that henceforth plaintiff is without authority to perform service under 'all-motor' local and 'all-motor' joint rates with connecting motor carriers," reflects a change of policy on the part of the Commission.

7. In holding and concluding that the placing of the conditions on the certificates in question amounted to revocation in whole or in part of said certificates.

8. In holding and concluding that plaintiff's operation is and has been auxiliary or supplementary to train service within the definition expressed by the Commission and as understood by plaintiff in April, 1938, when the rights and operating authorities of its predecessors, White Lines, became vested in plaintiff.

9. In holding and concluding that although the findings required by Section 213 of the Motor Carrier Act of 1935 and its re-enacted provisions in Section 5(2)(a) and 382 (b) of the Interstate Commerce Act were appropriately made in the Commission's orders of April 1, 1938, in MC-F-445, and November 28, 1944, in MC-F-2327, that nevertheless such action represented finality of action on the part of the Commission.

10. In failing to hold and conclude that by the express terms of the original grant the Commission reserved the right to impose additional conditions in order to restrict the plaintiff to a service supplementary to and auxiliary of the rail service, and that the later conditions so imposed did no more than to restrict plaintiff to that type of service originally intended.

11. In holding and concluding that the restrictions imposed on plaintiff's certificates are repugnant to the express terms of the statute, Section 203(a)(14).

12. In holding and concluding that the operations of the railroad-owned motor carrier involved here must be the same as that of a regular common carrier by motor vehicle and cannot be restricted to the type of service intended by Section 5(2)(a) and (b) of the Act, namely a coordinated motor-rail service which would "enable such carrier [the railroad] to use service by motor vehicle to public advantage in its [the railroad's] operations" (italics supplied), said service being the type to be authorized to railroad-owned motor carriers as is made manifest by Section 5(2)(a) and (b) of the Act and the legislative history thereof.

13. In failing to hold that Section 5(2) of the Interstate Commerce Act requires that motor carriers acquired by rail

carriers be confined to operations which are supplemental to and auxiliary of rail service, and do not compete unduly with the rail carrier or other motor carriers.

14. In failing to hold and conclude that Section 5(2)(a) and (b) (formerly Section 213) by its express terms and legislative history require that railroad-owned motor carriers be regulated by the Commission so that the control of motor carriers does not get into the hands of other competing forms of transportation.

15. In holding that the Commission's order of November 28, 1944, approving the Frederickson Line purchase under Section 5(2) was a final action conferring operating rights on appellee.

16. In not holding that the Commission's order of November 28, 1944, approving the Frederickson Line purchase was an interlocutory order, and that no operating rights were conferred on appellee until a certificate of convenience and necessity issued under Section 207.

17. In holding and concluding that complete "grandfather" rights had become vested in plaintiff and said rights could not be delimited except in a proceeding under Section 212 of the Act.

18. In failing to hold that complete "grandfather" rights were not granted by the original certificates but in accordance with the mandate of Congress as specified in the Act and in the National Transportation Policy were limited to a coordinated service which was supplemental to and auxiliary of the rail service.

19. In holding and concluding that the Commission exceeded its statutory powers.

20. In failing to hold and conclude that there was ample justification for the Commission's exercise of its administrative processes and that said authority may be found in the Interstate Commerce Act, the legislative history thereof, and the National Transportation Policy.

21. In holding and concluding that the Commission's action in its reports and orders of March 4, 1946, and April 11, 1949, unlawfully and in violation of the Fifth Amendment of the Constitution of the United States revoked a substantial portion of plaintiff's certificates and operating authorities and thereby would destroy or materially impair the value thereof.

22. In holding and concluding that the Interstate Commerce Commission is without authority to make the orders here in question, in undertaking to substitute its judgment for that of the Interstate Commerce Commission with respect to transportation questions confided by law to the In-

terstate Commerce Commission, in failing to accept findings of the Interstate Commerce Commission which were amply supported by evidence, and in failing to hold that the orders of the Interstate Commerce Commission, 384 dated March 4, 1946 and April 11, 1949, are in all respects valid and lawful.

23. In setting aside, annulling, and permanently enjoining the orders of the Interstate Commerce Commission entered respectively on March 4, 1946, and April 11, 1949.

WHEREFORE, defendants, United States of America and Interstate Commerce Commission, pray that the final decree of the district court be reversed to the extent that it may be inconsistent with the errors herein assigned, and for such other orders as the court may deem fit and proper.

HERBERT A. BERGSON

Herbert A. Bergson

*Assistant Attorney General*

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General*

FREDERICK R. HANLON

Frederick R. Hanlon

*Special Attorney*

*Attorneys for the Department of Justice*

DANIEL W. KNOWLTON

Daniel W. Knowlton

*Chief Counsel*

ALLEN CRENSHAW

Allen Crenshaw

*Assistant Chief Counsel*

*Attorneys for the Interstate Commerce Commission*

429

In the United States District Court

(Title Omitted)

*Petition to Have Original Records in the District Court  
Transmitted to the Clerk of the Supreme Court of the  
United States, as a Part of the Record Upon  
Appeal—Filed Jan. 27, 1950*

Defendants-appellants petition the Court, pursuant to Rule 10, paragraph (4) of the Rules of the Supreme Court of the United States to authorize and instruct the Clerk of the District Court to transmit as a part of the record upon appeal to be filed in the Supreme Court of the United

States, original of all documents, transcripts, exhibits, or other parts of the District Court records, of which there are no copies on file, upon the following grounds:

Order allowing appeal to defendants-appellants from the decree of the District Court to the Supreme Court of the United States and citation to plaintiffs-appellees, were signed by the Honorable Michael L. Igoe, District Judge, on January 27, 1950; appeal papers, including "Defendants' (Appellants') Praecept for Transcript of Record", were filed in the office of the Clerk of the District Court on

January 27, 1950, wherein request was made to include, as a part of the transcript of record upon appeal, all documents, exhibits, transcripts, and other parts of the District Court records; and it appears that there are only originals of same such exhibits, documents, transcripts, or other parts of the District Court records on file, thereby involving much expense and work to prepare copies thereof for the transcript of record on appeal; and it appears that such parts of the District Court records will be necessary or desirable for the inspection of the Supreme Court.

Dated January 27, 1950.

HERBERT A. BERGSON

Herbert A. Bergson

*Assistant Attorney General*

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General*

FREDERICK R. HANLON

Frederick R. Hanlon

*Special Attorney*

OTTO KERNER, JR.

Otto Kerner, Jr.

*United States Attorney*

*For the United States of America.*

DANIEL W. KNOWLTON

Daniel W. Knowlton

*Chief Counsel*

ALLEN CRENSHAW

Allen Crenshaw

*Assistant Chief Counsel*

*For the Interstate Commerce Commission.*

432

In the United States District Court

(Title Omitted)

*Praeceptum for Transcript of Record—Filed Jan. 27, 1950*

To the Clerk of the Above-Named Court:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint with Exhibits 1-9 inclusive.
2. Answer of the United States of America.
3. Answer of the Interstate Commerce Commission.
4. Application of Omaha Chamber of Commerce for Leave to Intervene and Notice of Motion.
5. Application of State of Iowa *ex rel.* Iowa State Commerce Commission for Leave to Intervene and Notice of Motion.
6. Complaint in Intervention of State of Iowa *ex rel.* Iowa State Commerce Commission.
7. Order Granting Omaha Chamber of Commerce Leave to Intervene.
8. Order Granting State of Iowa, *ex rel.* Iowa State Commerce Commission Leave to Intervene.
- 433 11. Minutes of Hearing Held Before the Three-Judge Court in Chicago, Illinois, on September 28, 1949.
12. Exhibit containing the Record Before the Interstate Commerce Commission in Dockets MC-F-445, MC-F-2327, and MC-29130 Which Exhibit was presented to the Court in Civil Action No. 49-C-1005.
13. Oral Argument Before the Three-Judge Court in Chicago, Illinois, on September 28, 1949.
14. Defendants' Suggested Findings of Fact and Conclusions of Law.
15. Findings of Fact, Conclusions of Law, and Final Decree as entered by the Court in Civil Action No. 49-C-1005.
16. Petition for Appeal.
17. Order Allowing Appeal.
18. Citation on Appeal.
19. Notice of Appeal.
20. Assignment of Errors.
21. Statement of Jurisdiction of the Supreme Court of the United States.

22. Statement of Defendants-Appellants Directing Attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.
23. Certificate of Service of Notice of Appeal.
24. This Praecipe for Transcript of Record.
25. All Docket Entries in Civil Action No. 49-C-1005.

Dated January 26, 1950.

HERBERT A. BERGSON

Herbert A. Bergson  
*Assistant Attorney General*

WILLIAM D. McFARLANE

William D. McFarlane  
*Special Assistant to the Attorney General*

FREDERICK R. HANLON

Frederick R. Hanlon  
*Special Attorney*  
*For the United States of America*

DANIEL W. KNOWLTON

Daniel W. Knowlton  
*Chief Counsel*

ALLEN CRENSHAW

Allen Crenshaw  
*Assistant Chief Counsel*  
*For the Interstate Commerce Commission*

435 In the United States District Court

(Title Omitted)

*Certification of Service—Filed Jan. 30, 1950*

I hereby certify that on the 26th day of January, 1950, I mailed copies of (1) Petition for Appeal (2) Order Allowing Appeal (3) Citation on Appeal (4) Notice of Appeal (5) Assignment of Errors and Prayer for Reversal (6) Statement as to Jurisdiction (7) Statements by Appellants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States (8) Praecipe for Transcript of Record (9) Order as to Exhibits (10) Order to Clerk to Transmit Original Records, originals of which were filed with the Clerk of the District

Court, and (11) Certificates of Service to Counsel for the following named plaintiffs-appellees and intervenors at the addresses of each as indicated:

**THE CHICAGO, ROCK ISLAND & PACIFIC R. R. CO.**

Harry E. Boe, Esq.  
La Salle Station  
Chicago 5, Illinois

A. Rea Williams, Esq.  
Investment Building  
15th & K Sts., N.W.  
Washington, D. C.

**STATE OF IOWA, BY IOWA STATE COMMERCE COMMISSION**  
George Cosson, Jr., Esq.  
State Capitol  
Des Moines, Iowa

**OMAHA CHAMBER OF COMMERCE**

Robert H. Heinecamp, Esq.  
Omaha Chamber of Commerce  
Omaha, Nebraska

Henry E. Sasso, Esqs.  
77 W. Washington St.  
Chicago, Illinois

Dated January 30, 1950.

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General  
Department of Justice, Washington, D. C.*

Received  
1/27/50  
Harry E. Boe

437 MCH:sl  
In the United States District Court

(Title Omitted)

*Order to Include Original Exhibits in the Record  
on Appeal—Filed Jan. 31, 1950*

In accordance with the provisions of the praecipe of the United States and Interstate Commerce Commission for transcript of record on appeal of the above entitled cause to the Supreme Court of the United States:

IT IS HEREBY ORDERED that all of the original exhibits received in evidence in the United States District Court for the Northern District of Illinois in the trial of this cause before the three-judge court on September 28, 1949 be cer-

tified and transmitted to the United States Supreme Court as part of the transcript of the record on appeal.

Dated this 31st day of January, 1950.

ENTER:

IGOE  
Judge

439 Citation in usual form showing service on Harry E. Boe, *et al.*, filed Feb. 9, 1950, omitted in printing.

451 *The Following Are the Complete Docket Entries to and Including February 13, 1950*

D. C. Form No. 106 A

Three-Judge Case Judge Igoe, Shaw, Duffy

Docket Calendar

49C1005

TITLE OF CASE	ATTORNEYS
THE ROCK ISLAND MOTOR TRANSIT COMPANY, COMPLAINANT,	<i>For Plaintiff:</i>
vs.	Harry E. Boe
UNITED STATES OF AMERICA and	Martin L. Cassell
INTERSTATE COMMERCE COMMISSION,	1025 LaSalle St. Station, Chgo.
DEFENDANTS,	<i>For Defendant:</i>
(D)	Hon. Otto Kerner, Jr.
STATE OF IOWA, <i>ex rel.</i> IOWA STATE	U. S. Attorney
COMMERCE COMMISSION, and OMAHA	450 U. S. Court House (4)
CHAMBER OF COMMERCE, INTERVENORS.	Frederick R. Hanlon, Spec. Atty.
	Dept. Justice, Wash. 25, D. C.
	Daniel W. Knowlton, Chief Counsel
	Allen Crenshaw, Asst. Chief Counsel
	Interstate Commerce Commission
	R. H. Heinecamp,
	1700 W. O. W. Bldg.
	Omaha, Nebraska
	Henry E. Sasso, 77 W. Wash. St.
	Ernest Porter, Geo. Cosson, Jr.
	State Capitol, Des Moines, Iowa

*Basis of action:* Suit to set aside a certain report and order of the I. C. C.

Date	Plaintiff's Account	Received	Disbursed
6-20-49	H E B. ....@.....	15.00	
Jul 20 1949	June Report .....		15.00

452 49C1005

Date	Filings-Proceedings	Clerk's Fees	Amount Reported in Emolument
		Plaintiff	Defendant Returns
6-20-49	Filed complaint and (5) copies (21) (Exs) (JS-5)	15.00	
6-20-49	Issued summons and (5) copies with copies of complaint		

Date	Filings-Proceedings	Clerk's Fees Plaintiff Defendant	Amount Reported in Emolument Returns
6-21-49	Fld. Mo. for Temp. Restr. Ord. (3)		
" " "	Fld. Affidvt. of Wm. F. Peterson.		
" " "	(12)r		
" " "	Ord. mo. for temp. restr. ord. is entd. & cont. to June 27, 1949—Igoe, J.		
"-27 "	Mld. notc. to attys., 6-30-49. r		
"-27 "	Order Mo. for Tem. Rest. Order is cont. on Pltf's Mo. to Aug. 12, 1949 Igoe—J. m/s		
7-5-49	Mailed notices 7-7-49 Jun 30 1949		15.00
7-5-49	Filed summons returned served.		
	1 serv. \$2.00 jb		
8-12-49	Ord. mo. for temp. restr. ord. is cont. by agmt. to Sep. 28, 1949, at 2:00 P.M.—Igoe, J.		
	Mld. notc. to attys., 8-16-49. r		
8-19-49	Fld. Ans. Interstate Commerce Com- mission. (7) r		
8-26-49	Filed answer of U. S. A. (5)P		
9-6-49	Filed Proof of Service of Answer. (1) jb		
9-14-49	Filed Designation of J. Earl Major, Circuit Judge (1)		
9-16-49	Mld. letter of notification of designa- tion to Otto Kerner Jr., Attorney General and Interstate Commerce Commission, Washington D. C. (Registered Mail) P		
	2		
9-26-49	Fld. / Notices, Motion & Complaint Iowa in Intervention by / State Commerce Commission. (3) (3) (4) (8)		
" " "	Ord. State of Iowa by the Iowa State Commerce Comm. is given lv. to in- tervene herein & to fl. an intervening complt—DRAFT—Igoe, J. (1)		
9-26-49	Fld. 2 Notices, Motion & Application for Lv. to Intervene by Omaha Cham- ber of Commerce. (2) (2) (1) (3)		
" " "	Ord. Omaha Chamber of Commerce is given lv. to intervene herein & be represented by counsel—DRAFT— Igoe, J. (1)		
	Mld. notc. to attys., 9-26-49. r		

Date	Filings-Proceedings	Clerk's Fees Plaintiff Defendant	Amount Reported in Emolument Returns
9-28-49	Fld. Ans. of USA & ICC, & 3 Copies. (3)		
" " "	Ord. hrg. held & Concl'd. on the merits herein. Pltf. files brf. in sup- port of its position instr. Interstate Commerce Comm. given ten (10) ds. herefrom to fl. ans. brf. Pltf. & the Intervenors herein are given ten (10) ds. thereafter to fl. reply brfs. Coun- selors instructed to submit proposed Findings of Fact & Concls. of Law with their brfs. Cause is taken un- der advsmt.—Duffy, C. J., Igoe, D. J., Shaw, D. J.		
	Mld. notc. to attys, 10-4-49. r		
10-10-49	Fld. Brf. of Interstate Commerce Comm. (29) r		
10-13-49	On its own motion, pltf's tm. to fl. re- ply br. extended to 10-28-49—Igoe, J. Mld. notice to attys. 10-17-49 P		
11-29-49	Enter Findings of Fact—DRAFT—(8) Enter Conclusions of Law—DRAFT— (3). Enter judgment order setting aside and enjoining the reports and orders of the I. C. C. entered respec- tively on March 4, 1946 and April 11, 1949. Defts. are permanently en- joined from enforcing or attempting to enforce said reports and orders— DRAFT—Duffy, C. J., Igoe, D. J., Shaw, D. J. (JS6) (2) Mld. notice to attys. 12-2-49 P		
11-29-49	Filed Memorandum Opinion. (11)		
453	49 C 1005—THE ROCK ISLAND MOTOR TRANSIT CO. VS. U.S.A. ET AL. D. C. 110 A		
1-27-50	Filed Petition for appeal of U. S. A. et al. —(2)		
" " "	Order allowing appeal by defendants DRAFT— — / Igoe, J. (1)		
" " "	Filed Notice of Appeal of defend- ants (2)	5.00 US	
" " "	Filed Assignment of Errors and Prayer for Reversal (5)		
" " "	Filed Statement as to Jurisdiction etc. (40)		

<i>Date</i>	<i>Filings-Proceedings</i>	<i>Amount Reported in</i>	
		<i>Clerk's Fees</i>	<i>Emolument Returns</i>
1-27-50	Filed Statement directing attention to Paragraph 3 of Rule 12 of the Revised Rules of the S. C. of the U. S.		
" " "	(2)		
" " "	Filed Praeipe	(2)	
" " "	Filed Petition to have original records etc. transmitted as part of the record to U. S. S. C.	(2)	
" " "	Mld. notice to attys. 1-27-50	(2)	
1-30-50	Filed Certificate of Service	(1)	
1-31-50	Ord. to transmit original exhibits in record on appeal—DRAFT—Igoe, J.		
" " "	(1)		
" " "	Mld. notice to attys. 1-31-50	P	
" " "	Filed Pltf's. collective Ex. 1, being documents 1 to 23, inclusive.	P	
2-3-50	Fld. Transcript of Proceedings had Sept. 28, 1949, before Js. Shaw, Igoe, and Duffy, C. J.	(92)r	
2-13-50	Filed Motion to Affirm, of Appellees, The R.Is.M.T.Co., and Certificate of Service	(8 & 1) B	
2-9-50	Filed Citation on Appcal. ret'd. served. 2 serv. \$4.24	(1)P	
454	Clerk's Certificate to foregoing transcript omitted in printing.		

1 *Plaintiff's Collective Exhibit No. 1—  
Filed Oct. 13, 1937*

Form BMC-21

APPLICATION FOR AUTHORITY UNDER SECTION 213, MOTOR CARRIER ACT, 1935, TO PURCHASE, TO LEASE, OR TO CONTRACT TO OPERATE THE PROPERTIES, OR ANY PART THEREOF, OF A MOTOR CARRIER, OR FOR ACQUISITION OF CONTROL OF SUCH CARRIER THROUGH OWNERSHIP OF STOCK

Docket No. MC-F 445

Before the  
Interstate Commerce Commission

Application of—

THE ROCK ISLAND MOTOR TRANSIT COMPANY, A CORPORATION,  
FOR AUTHORITY TO ACQUIRE PROPERTIES AND OPERATING  
RIGHTS OF WHITE LINE MOTOR FREIGHT COMPANY, INC.,  
AND WHITE LINE TRUCKING COMPANY, CORPORATIONS.

TO THE INTERSTATE COMMERCE COMMISSION, WASHINGTON,  
D. C.:

Applicant states:

- I. That full and correct name of applicant is—  
THE ROCK ISLAND MOTOR TRANSIT COMPANY.  
Business address is—  
139 West Van Buren Street, Chicago, Illinois.
- II. That applicant is a corporation organized under the laws of the State of Illinois doing business under the trade name or style of The Rock Island Motor Transit Company, and that information respecting applicant is set forth in Exhibit A and supplemental exhibits, attached hereto and made a part hereof.
- III. That information respecting the nature of the transaction proposed and the terms and conditions thereof, is set forth in Exhibit B and supplemental exhibits, attached hereto and made a part hereof.
- IV. That there are set forth in Exhibit C, attached hereto and made a part hereof, the facts and circumstances relied upon:
  - (a) If applicant is a motor carrier:  
To establish that the transaction covered by this application will be consistent with the public interest; or
  - (b) If applicant is a carrier other than a motor carrier or is a person controlled by such a car-

rier other than a motor carrier or affiliated therewith within the meaning of section 5(8) of part I, Interstate Commerce Act:

To establish that the transaction covered by this application will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition.

- V. That applicant will submit such additional information to support the applicant's prayer herein as the Commission may require.

WHEREFORE, the applicant prays that the Interstate Commerce Commission enter an order approving and authorizing the transaction proposed as set forth in Exhibit B, and supplemental exhibits;

- 2 AND APPLICANT FURTHER PRAYS: That if the approval and authorization of the transaction covered by this application necessitate the transfer of one or more Certificates of Public Convenience and Necessity or Permits, the Commission take such action in the premises as may be deemed necessary to consummate such transfers.

Dated this 5th day of October, 1937.

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
(Applicant)

JAMES E. GORMAN,  
By James E. Gorman,  
President.

Post-office address—  
139 West Van Buren Street,  
Chicago, Illinois.

- 3 APPLICATION FOR AUTHORITY UNDER SECTION 213, MOTOR CARRIER ACT, 1935, TO PURCHASE, TO LEASE, OR TO CONTRACT TO OPERATE THE PROPERTIES, OR ANY PART THEREOF, OF A MOTOR CARRIER, OR FOR ACQUISITION OF CONTROL OF SUCH CARRIER THROUGH OWNERSHIP OF STOCK

OATH

State of Illinois }  
County of Cook } ss.:

JAMES E. GORMAN makes oath and says that he is President of THE ROCK ISLAND MOTOR TRANSIT COMPANY, a cor-

poration; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information and belief.

JAMES E. GORMAN

James E. Gorman

Subscribed and sworn to before me, a Notary Public, in and for the State and county above named, this 5th day of October, 1937.

(SEAL)

W. J. GEDL

W. J. Gedl

My Commission expires:  
November 15, 1937.

7

### *Exhibit B*

#### The Rock Island Motor Transit Company

#### NATURE OF TRANSACTION PROPOSED AND TERMS AND CONDITIONS THEREOF

1. Attach and identify as Exhibit B-1-(a), copy of any contract or other written instrument or instruments entered into, or proposed to be entered into, pertaining to the transaction covered by this application. If not contained in written contract or other instrument, attach and identify as Exhibit B-1-(b), statement containing detailed description of the transaction covered by this application, including manner in which it is proposed to consummate transaction and consideration involved.

See<sup>9</sup> Exhibit B-1-(a)-(1), being draft of agreement between applicant and Lawrence E. Stone of Des Moines, Iowa, setting forth the terms and conditions upon which it is proposed that applicant shall acquire the properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company. Applicant also attaches as Exhibit B-1-(a)-(2) draft of escrow agreement as contemplated by principal agreement, identified as Exhibit B-1-(a)-(1).

2. Attach separate statement, to be marked Exhibit B-2, showing for each property covered by this application, detailed description, number of units (of equipment only); and ledger value (or estimated value where ledger value not available) of:

See Exhibit B-2, being a schedule of physical property, including equipment, proposed to be acquired. Said schedule, identified as B-2, is incorporated in the principal agreement (Exhibit B-1-(a)-(1)) as Exhibit B.

3. If any of the properties covered by this application is encumbered and applicant has agreed to assume obligation in regard thereto, set forth in separate statement, and identify as Exhibit B-3, the following information for each such item of property:

Under paragraph 5 of Article II of the Principal Agreement (Exhibit B-1-(a)-(1)) the seller agrees to convey the personal property proposed to be acquired, free and clear of all liens and encumbrances, except those not exceeding \$9,400 in amount. See Exhibit B-2 for particular reference to items of property against which encumbrances exist at this time. It is intended by paragraph 5 of Article II of said Principal Agreement that applicant shall assume such encumbrances up to but not exceeding the amount of \$9,400.

4. Attach and identify as Exhibit B-4, separate statement containing such data as applicant feels will properly explain and support the financial consideration involved in the proposed transaction, together with advice of such results as it may be normally expected will follow consummation of the proposed transaction.

Applicant has caused a careful investigation to be made and has concluded that the consideration is reasonable as the purchase price for the properties proposed to be acquired. As indicated by the Principal Agreement (Exhibit B-1-(a)-(1)) it is proposed that in addition to the physical properties set forth in Exhibit B-2, applicant will acquire such operating rights as are enjoyed and possessed by said White Line Motor Freight Company, Inc., and White Line Trucking Company, both of which are established motor carriers and have been conducting a going business for a sufficient time to demonstrate a substantial economic value. Furthermore, it is

- 8 anticipated that possible coordination of service between applicant and the rail service of Frank O. Lowden, James E. Gorman and Joseph B. Fleming as trustees of The Chicago, Rock Island and Pacific Railway Company will permit not only an improvement in transportation service to the public but the effecting of economics in operating expenses without sacrifice of the interests of either the public or applicant or the creditors of said trustees.
5. State whether other party to transaction proposed is engaged in transportation by motor carrier in interstate or foreign commerce:

No. See following note:

The other party to the transaction, Lawrence E. Stone, is the holder of options of all the capital stock of White Line Motor Freight Company, Inc., and White Line Trucking Company. Information as to applications for permits or certificates of said carriers follows:

**WHITE LINE MOTOR FREIGHT COMPANY, INC.**

*If granted*  
*Date No.*

*If applied for but not yet granted*  
*Date of application      Docket No.*

of I. C. C. Common  
Carrier certificate of  
Public convenience  
and necessity.

January 31, 1936    29130

**WHITE LINE TRUCKING COMPANY**  
of I. C. C. Contract

Carrier Permit      February 10, 1936    49147

6. If there is any financial or other relationship, direct or indirect, existing at the present time between applicant and other party to the transaction proposed, explain fully:
- None.

7. Attach the following as separate exhibits, identifying them as indicated:

- B-7-(a) Copy of all resolutions of directors authorizing the transaction proposed, authenticated by a proper executive officer of the applicant; and, if the charter or bylaws require approval by the stockholders, copies of the resolutions of the stockholders authorizing the transaction

proposed, and indicating the percentage of stock voting for such authorization.

See Exhibit B-7-(a) being a copy of resolution of directors of applicant adopted on October 5, 1937, authorizing transaction proposed, said exhibit being duly authenticated by the secretary of the company.

- B-7-(b) Copies of all resolutions of stockholders or directors, or duly authorized committee thereof, authenticated by proper executive officer of the applicant, designating by name and for that purpose the executive officer by whom the the applicant is signed and verified, and filed on behalf of the applicant.

See Exhibit B-7-(a) being copy of resolution of the directors of the applicant, authenticated by the secretary of the company, designating the president or any vice president of the company, as the executive officer authorized to sign and verify this application.

- 9 B-7-(c) If an organization other than a corporation is an applicant \* \* \*

Inapplicable as applicant is a corporation.

- B-7-(d) If a trustee, receiver, or like representative of the real party in interest, is an applicant, there shall be furnished a certified copy of the order of the court, if any, having jurisdiction, authorizing the contemplated action.

See Exhibit B-7-(d), being certified copy of an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, in proceedings under No. 53209 in the matter of The Chicago, Rock Island and Pacific Railway Company, debtor, which order was entered on October 4, 1937, in respect to the proposed acquisition of the properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company.

- B-7-(e) Opinion of counsel that the transaction described in the application meets the requirements of law and will be legally authorized

and valid, if approved by the Commission, with specific reference to any specially pertinent provisions of the applicant's charter or articles of incorporation.

See Exhibit B-7-(e), being opinion of counsel that transaction described meets the requirements of law and will be legally authorized and valid if approved by the Commission.

- B-7-(f) General or key map correctly indicating the lines or routes of the applicant, and the other party or parties to the transaction proposed to the extent such lines of the other party or parties are involved in the transaction proposed. The lines of each of the parties so shown shall be segregated by colors. U. S. Highway numbers should be used wherever applicable; otherwise, State or county highway numbers should be used.

See Exhibit B-7-(f), being a map correctly indicating lines or routes of White Line Motor Freight Company, Inc., and White Line Trucking Company to the extent such lines are involved in the transaction proposed, together with the lines of railroad of The Chicago, Rock Island and Pacific Railway Company in the affected territory.

- B-7-(g) If application is for authority to purchase, attach "Giving Effect" Balance Sheet Statement, as of the latest available date, showing the estimated effect of the consummation of the transaction proposed.

See Exhibit B-7-(g).

### *Exhibit B 1 (a) (1)*

#### AGREEMENT

THIS AGREEMENT made by and between LAWRENCE E. STONE of Des Moines, Polk County, Iowa, Party of the First Part, hereinafter called "Stone," and THE ROCK ISLAND MOTOR TRANSIT COMPANY, an Illinois Corporation having its principal place of business in Chicago, Cook County, Illinois, duly qualified to do business in Iowa, Party of the Second Part, hereinafter called the "Rock Island,"

## WITNESSETH, That:

The parties, in consideration of the mutual and dependent covenants herein contained, do hereby agree as follows:

## ARTICLE I.

1. Stone is the owner of certain shares of stock in the White Line Motor Freight Company, Inc., White Line Trucking Company, and White Line Transfer & Storage Company, (herein sometimes referred to, respectively, as Motor Freight, Trucking Company, and Storage Company), which are Iowa corporations, all having their principal places of business in the City of Des Moines, Polk County, Iowa, and in addition thereto holds an option for the purchase of the controlling stock interest in said three corporations. The Rock Island desires to acquire certain certificates of convenience and necessity, truck operator's permits and other rights held by White Line Motor Freight Company, Inc. and White Line Trucking Company, as well as certain of the physical assets of said corporations, and Stone desires to acquire a controlling interest in the capital stock of the White Line Transfer & Storage Company. The Rock Island may not lawfully acquire the property and assets of the White Line Motor Freight Company, Inc. and White Line Trucking Company except with the approval of the Interstate Commerce Commission, the Illinois and Iowa State Commerce Commissions, and this contract shall have no force or effect unless approved by the Interstate Commerce Commission and state commissions above named.

2. The property and rights which the Rock Island desires to acquire and which Stone is willing to sell after exercising his option for the purchase of the controlling interest in the capital stock of said three corporations consist of:

First. Certificates of convenience and necessity issued by the Iowa Board of Railroad Commissioners authorizing and empowering the Motor Freight to operate as a common motor freight carrier between points within the State of Iowa. The certificate numbers, terminal points between which common motor freight carrier operations are authorized, and the dates of the certificates so held are more particularly described as follows, to wit:

*Certificate*

<i>No.</i>	<i>Terminal Points</i>	<i>Date</i>
313	Des Moines, Iowa, and Dav- enport, Iowa, with certain exceptions.	February 17, 1931
345	West line of the State at Council Bluffs, and Des Moines, Iowa, with excep- tions.	June 24, 1931
428	Des Moines, Iowa and Coun- cil Bluffs, Iowa, with excep- tions.	December 31, 1932
313	Amendment by resolution of Iowa Board of Railroad Commissioners. The ter- minal points are Iowa City and Cedar Rapids, and Iowa City and Muscatine.	July 15, 1935

Second. The rights held by the Motor Freight and White Line Trucking Company under truck operator's permits issued by the Iowa Board of Railroad Commissioners of the State of Iowa, which permits, with the dates of their issue, are more specifically described as follows, to-wit:

<i>Holder</i>	<i>Permit No.</i>	<i>Date</i>
White Line Motor Freight	12,204	March 23, 1936
White Line Trucking Co.	7,903	September 22, 1933

Third. All rights of the White Line Motor Freight Company, Inc. to operate as a motor carrier of freight which may ultimately be granted on the application of said corporation in I. C. C. Docket No. 29130 over the following described highways in the states of Iowa, Illinois and Nebraska, to-wit:

From Omaha, Nebraska, to Silvis, Illinois, via Iowa and U. S. Highway No. 6.

From Silvis, Illinois, to the junction of Illinois Highways No. 86 and No. 92 via Illinois No. 86.

From the junction of Illinois Highways No. 86 and No. 92 to the junction of Illinois No. 92 and U. S. No. 34, via Illinois No. 92.

From the junction of Illinois No. 92 and U. S. No. 34 to Chicago, Illinois, via U. S. Highway No. 34.

33 From junction of U. S. No. 6 and Iowa and U. S. No. 161, at Iowa City, Iowa, to Cedar Rapids, Iowa, via Iowa and U. S. No. 161.

From the junction of U. S. No. 6 and Iowa No. 91 to Oxford, Iowa, via Iowa No. 91.

From junction of U. S. No. 6 and Iowa No. 38 to Muscatine, Iowa, via Iowa No. 38.

The enumeration of the foregoing highways and routes constitutes no warranty by Stone that the White Line Motor Freight Company, Inc., or White Line Trucking Company will receive from the Interstate Commerce Commission certificates of convenience and necessity or truck operator's permits as to all of said highways and routes; in the event that the Interstate Commerce Commission shall deny the application for rights to operate over said highways and routes such fact shall not constitute grounds for refusal by the Rock Island to perform this contract, nor shall it constitute a ground for partial abatement of the purchase price.

Fourth. All rights of the White Line Trucking Company to operate as a truck operator under an interstate permit which may ultimately be granted on the application of said corporation in I. C. C. Docket No. 49147.

Fifth. The tangible personal property consisting of trucks, complete with bodies and spare tires, trailers and semi-trailers, complete with bodies, spare tires and fifth wheel attachments, tractors with cabs and fifth wheel attachments, automobiles, office equipment, adding machines, typewriters, furniture and miscellaneous office fixtures and equipment located in the offices of Motor Freight and Trucking Company at Des Moines, Davenport, Iowa City and Newton, Iowa, Chicago, Illinois, and Omaha, Nebraska; garage tools and equipment located at Davenport, Iowa, Omaha, Nebraska and Chicago, Illinois, all of which tangible personal property is specifically described upon the schedule marked Exhibit "B" hereto attached and identified by the signatures of Lawrence E. Stone and W. F. Peterson.

Sixth. Loading docks, miscellaneous tools, hand trucks and incidental equipment and supplies located at points other than Des Moines, Iowa, used in connec-

tion with the operation of the business of the White Line Motor Freight and Trucking Company not specifically described on Exhibit "B" hereto attached.

Seventh. The good will of the business heretofore carried on by Motor Freight and Trucking Company, together with the exclusive privilege of using the name "White Line" as descriptive of a motor freight or trucking business, insofar as such good will and exclusive privilege to use the name "White Line" are susceptible of conveyance.

34      3. Rock Island agrees to promptly make application to the Interstate Commerce Commission and to the Iowa State and Illinois Commerce Commissions for the approval of the acquisition by the Rock Island of the property and rights hereinbefore described, and to prosecute such applications with all reasonable diligence and without unnecessary delay on its part in a good faith effort to secure the approval of said Interstate Commerce Commission and state commissions to the acquisition of the property and rights hereinbefore described.

4. Stone shall, coincident with the execution of this instrument, and as a condition to the taking effect of this contract, procure the deposit with the Valley Savings Bank of Des Moines, Iowa, of all of the outstanding shares of stock of the White Line Transfer and Storage Company, White Line Motor Freight Company, Inc., and White Line Trucking Company. The stock-certificates of said corporations shall be endorsed in blank, and shall be accompanied by a statement in writing, signed by the secretary of each of said corporations, that the certificates so delivered constitute all of the outstanding capital stock of each of the three corporations named. The stock so deposited shall be held by the Valley Savings Bank of Des Moines,

35      Iowa, as an escrow agent, under the terms of an escrow agreement, a copy of which is hereto attached marked Exhibit "A," and by this reference made a part hereof.

5. The Rock Island agrees that coincident with the execution of this agreement, it will deposit in the hands of the Valley Savings Bank of Des Moines, Iowa, as Escrow Agent, the sum of Eighty Thousand Dollars (\$80,000) which shall be held by said bank under the terms of said escrow agreement, Exhibit "A."

## ARTICLE II

1. In the event that the Interstate Commerce Commission, the Illinois and Iowa State Commerce Commissions shall approve this contract, and authorize the Rock Island to acquire the property and rights described in the foregoing article, upon the terms herein set forth, within the life of Stone's option, or any extension or renewal thereof, either party may in writing notify the other party and the Valley Savings Bank of such approval of this contract by such regulatory bodies, and the Valley Savings Bank shall then proceed in accordance with the directions contained in the escrow agreement copy of which is hereto attached marked Exhibit "A."

36 2. Upon the delivery, under option as aforesaid, of the stock of the White Line Motor Freight Company, Inc. and White Line Trucking Company to Stone, he agrees, as promptly as possible, to call a stockholders' meeting and proceed to dissolve said corporations. In connection with such dissolution, Stone shall cause the White Line Motor Freight Company, Inc. and White Line Trucking Company to transfer to himself all their assets of every kind and character in consideration of his assumption and agreement to pay their liabilities. Upon receipt of such conveyances, Stone will immediately sell, transfer, assign, and set over to the Rock Island all the properties of said corporations described in Article I hereof, and all other personal property specifically listed and described on Schedule "B" hereto attached, which is identified by the signatures of Lawrence E. Stone and W. F. Peterson, and by this reference made a part hereof. All conveyances, transfers and assignments shall be evidenced by bills of sale, assignments, or other instruments duly executed by Stone, and shall be sufficient to transfer to the Rock Island all rights, title and interest of Stone in and to the property so conveyed.

3. Stone shall retain the book accounts, notes and accounts receivable of the White Line Motor Freight Company, Inc. and White Line Trucking Company, and shall, coincident with the conveyance of the assets herein described to the Rock Island, execute such conveyances  
37 or assignments as may be necessary to transfer and set over to the White Line Transfer & Storage Company all of the remaining assets of said White Line Motor Freight Company, Inc. and White Line Trucking Company.

Stone covenants to warrant and defend the title to all of the equipment and other property which he shall convey to the Rock Island under the terms of this contract, and he covenants to indemnify and save harmless the Rock Island from any loss, damage or expense as the result of any defect in the title to any of said property.

4. Stone covenants and agrees that the equipment listed upon Schedule "B" which requires licenses for operation shall be licensed by the White Line Trucking Company or White Line Motor Freight Company, Inc. in one of the States of Iowa, Illinois or Nebraska. In the event that the conveyances of such equipment shall not be accomplished before January 1, 1938, Stone covenants that he will pay, or cause the Motor Freight or Trucking Company to pay, such license fees on such equipment in the state required, for the year 1938. Upon the conveyance of such equipment to it, the Rock Island will credit upon the amount owing by Stone to it, the unexpired portion of such license fees for the year 1938.

5. Stone will convey the personal property herein described to Rock Island, free and clear of all liens and encumbrances, except those not exceeding \$9,400 in amount, and such liens as landlords may have for rent not yet past due. No lien shall have any past due installment unpaid at the date of the transfer. Stone covenants and agrees that the encumbrances upon and unpaid purchase price of the equipment shall not exceed \$9,400 at the time same is conveyed to the Rock Island under the terms of this contract. In the event that the encumbrances and unpaid purchase price of the equipment shall be less than the sum of \$9,400 on the date when said equipment may be conveyed to the Rock Island, the difference between the amount of such encumbrance and unpaid purchase price and the sum of \$9,400 shall be credited one-fourth upon each of the four notes given by Stone, as provided in Article III of this Agreement.

6. Stone will procure the transfer and conveyance to the Rock Island of all the operating equipment and supplies not specifically described in Schedule "B" but owned and used by the White Line Motor Freight Company, Inc. and White Line Trucking Company in the operation of their business, and located at any point other than Des Moines, Iowa. This shall include office furniture, stationery, supplies, typewriters, adding machines, loading equipment.

hand trucks, miscellaneous tools, loading docks, and other miscellaneous personal property, but shall not include garage tools and equipment at Des Moines, Iowa, provided Stone shall not be required to warrant title to such of the aforesaid property as against any landlord or lessor which may be deemed to be fixtures attached to real estate.

39     7. Stone covenants that the equipment described upon Schedule "B" hereto attached shall be maintained in a good state of repair and appearance, as well as in first-class road condition, and in usable shape from the date of this agreement to the date upon which the Rock Island may procure a conveyance of such equipment, and specifically guarantees that such equipment at the time of delivery to the Rock Island shall be in first-class road condition, and in usable shape. Stone further guarantees that the White Line Motor Freight Company, White Line Transfer & Storage Company and White Line Trucking Company, will during the period between the date of this agreement and the date upon which the Rock Island may take over and acquire such equipment, make all payments called for by the instruments creating liens or encumbrances on the title to any of said property, and shall pay the rental called for by the leases hereinafter described.

8. Stone covenants and guarantees that the White Line Motor Freight Company, Inc., White Line Trucking Company, or White Line Transfer & Storage Company will keep all of the equipment specifically listed and described upon Schedule "B", insured against loss or damage by fire and theft between the date of this contract and the date when the Rock Island may take over such equipment as herein provided. In the event that any of the items of equipment listed upon Schedule "B" are destroyed by fire, or are stolen, and for such reasons are unavailable at the time the Rock Island consummates the purchase  
40     of said equipment, then the Rock Island shall have the full benefits of any insurance money collected by Stone, the White Line Motor Freight Company, Inc., White Line Trucking Company, or White Line Transfer & Storage Company, and the proceeds of any insurance realized on account of damage, loss or destruction by fire or theft of any such equipment, shall be deposited with the Valley Savings Bank, and be by it held in escrow. In the event the Escrow Agent shall thereafter be obligated by the terms of the escrow agreement to deliver the \$80,000 deposited with it to May E. Mills and does so deliver it.

the Escrow Agent shall immediately thereafter deliver the proceeds of all insurance deposited with it to Rock Island. In this case said Stone shall be no further obligated to deliver the property so insured and destroyed and will be deemed to have fully performed his contract as to such property. In the event the Escrow Agent shall thereafter be obligated by the terms of the escrow agreement to deliver the \$80,000 deposited with it to Rock Island, or its successors or assigns, then it shall deliver the proceeds of all insurance deposited with it to said Mills. But the parties may in writing agree that the proceeds of such insurance shall be used for the purchase of new equipment and in such event the Rock Island will accept conveyances of such new equipment, subject to the lien of purchase money mortgages, or conditional bills of sale.

9. In the event that any of the equipment (not to exceed 10% in number of units) described upon Schedule "B" shall be damaged or destroyed by any casualty not covered by insurance, or shall be entirely worn out before the Interstate Commerce Commission and state

41 commissions herein named shall have acted upon the approval of this contract, and for such reasons Stone cannot deliver such equipment to the Rock Island, then Stone agrees to pay to the Rock Island for each truck, tractor, passenger automobile, trailer or semi-trailer not delivered, a sum equal to five-ninths of the value set opposite such piece of equipment upon Schedule "B" hereto attached, and by so paying will be deemed to have fully performed his contract as to such property. In the event such payment cannot be made at the time the Rock Island receives the conveyances of equipment and other assets, said payment shall be evidenced by negotiable promissory note of Stone payable to the Rock Island not more than one year after the date of the transfer of equipment, with interest at 5% per annum. Should in excess of 10% in number of units of equipment be undeliverable for the reasons in this paragraph stated, this contract shall be cancelled without liability to either party.

10. Stone covenants that the Motor Freight and Trucking Company are lessees under outstanding valid and subsisting lease of real estate, buildings and offices used for terminal, garage and office purposes. Said leases cover the locations specified at monthly rentals and with expiration dates as follows:

Location	Lessor	Legal Description	Monthly Rental	Termination Date
Chicago, Ill.	D. W. Hoff, Agt.		\$175. p. mo.	July 1, 1937
			200. " "	July 1, 1937 to July 1, 1939
	Little Company Mary Hospital	W½ Lots 12 and 13 Block 1, Bowen & Smiths 39th St. Subdivision	12.50 " "	July 1, 1939
42	Convent of the Sacred Heart	E½ Lots 12 and 13 Block 1, Bowen & Smiths 39th St. Subdivision	12.50 " "	July 1, 1939
Omaha, Nebr.	Hazel B. Hart	1809-1811 Cumming St., Lot 2, Block 213½	125. " "	Feb. 1, 1938
Newton, Iowa	Daly Lbr. Co.	Lot 10 of Cutlot 4 of Exline's Addition	40. " "	Nov. 1, 1941
Davenport, Iowa	Central Engineering Company	820 W. 1st St.	75. " "	at will
Iowa City, Iowa	CR&IC Ry.	CR&IC ft. house	30. " "	at will
Atlantic, Iowa	Armour & Co.	Armour Buildings	15. " "	at will
Des Moines, Iowa	White Line Transfer & Storage Co.	120 SW 5th St. offices Des Moines Terminal office	75. 35.	" "
	White Line Transfer & Storage Co.	Gar. 101, 109 SW 5th St. Dock and loading facilities, 111, 115 SW 5th	275. " "	Oct. 1, 1938

11. Stone covenants to transfer and assign to the Rock Island the lessee's interest in such of the above and foregoing leases as the Rock Island shall elect to acquire. The Rock Island shall signify its election with respect to the leases above described by giving notice in writing to Stone at Des Moines, Iowa, on or before the completed transfer of the physical assets herein provided for. If any such leases shall be rejected by the Rock Island within a less period than sixty days before the completed transfer of the physical assets herein provided for, the Rock Island

43 shall pay the rental called for by said leases for a period of sixty days from and after the giving of the notice herein required. All transfers of such leases shall be subject to the consent of the landlord where by the terms of the lease such consent is required. Stone covenants that he, the Motor Freight Company, Inc. or Trucking Company will pay all rents accruing prior to the date of the transfer of the physical property and equipment to the Rock Island.

12. Rock Island shall be under no obligation to assume or accept any of said leases, except as to the lease of Newton, Iowa, at a rental of Forty Dollars per month, expiring on November 1, 1941, which particular lease the Rock Island will accept and assume all the obligations of the tenant thereunder, subject however to the consent of the landlord, if required. As to such leases as the Rock Island may accept and assume, it shall pay the rental and assume all the obligations of the tenant thereunder, and save the Motor Freight, Trucking Company and Stone harmless from all rents subsequently accruing.

13. Stone covenants that the Motor Freight and Trucking Company have no outstanding operating agreements or contracts covering the operation of the business conducted by them pertaining to the picking up or delivery of freight, or the interchange thereof with other carriers, except such as are herein specifically described, and except agreements with organizations of employees pertaining to wages, working conditions and terms of employment. The Motor Freight Company has an agreement with the Cedar Rapids Transfer & Storage Company at Cedar Rapids, Iowa, to handle all pick-up and delivery, collection and office service at the rate of six cents per Cwt. with a minimum charge of twenty cents for any one item.

44 Stone agrees to procure the assignment and transfer of the Motor Freight Company's interest in and to such contract to the Rock Island, insofar as it may be susceptible of such assignment and transfer.

14. Stone covenants that except as shown by various tariffs on file with the Interstate Commerce Commission or other public authorities, or by the terms of the certificates and permits, or in accordance with the requirements of law, neither the Motor Freight nor Trucking Company is obligated to perform transportation service at any fixed schedule of rates for any particular period of time; that such corporations have no contracts with any officers for services, except such as are terminable on thirty days' no-

tice, and Stone covenants and agrees that the Motor Freight and Trucking Company will enter into no contracts with any of its officers or agents after the execution of this instrument, except such as are terminable upon thirty days' notice in writing. It is understood that both the Motor Freight and Trucking Company have agreements with employes, or organizations representing employes, and may enter into such agreements with organizations of employes pertaining to wages, working conditions and terms of employment, including rate of pay, hours of service, or working conditions, provided that no such contract or collective bargaining agreement shall be effective for more than one year. If any contract or collective bargaining agreement of the type above described is entered into, Stone covenants and agrees to furnish a copy thereof to the Rock Island within ten days after its execution by the Motor

Freight Company or Trucking Company, as the case  
45 may be, and if unacceptable to the Rock Island it may within twenty days after receipt of the copy of such contract, terminate and cancel this contract by notice addressed to Stone at Des Moines, Iowa. In the event of such election by the Rock Island this contract shall be cancelled without liability to any party.

15. In the event that either the Interstate Commerce Commission, the Iowa State Commerce Commission, or Illinois Commerce Commission shall disapprove this contract, or prevent the Rock Island from acquiring the property and rights described in Article I upon the terms set forth, within the life of Stone's option, or any extension thereof, or in the event that within the life of said option, either the Interstate Commerce Commission, the Iowa or Illinois Commerce Commission shall require a substantial modification, which is unacceptable to the Rock Island or to Stone, in the terms of this instrument as a condition to the approval of this contract, then this entire agreement shall be wholly inoperative, and all parties shall be released from the terms and provisions hereof without liability of any kind or character. In such events, the parties hereto, or either of them, shall within ten days after service of any order in the premises from any of such commissions notify the Escrow Agent to pay over to the Rock Island Motor Transit Company the money deposited by it with the Escrow Agent, and to deliver to Mrs. May E. Mills the shares of stock deposited with said Escrow Agent. It is understood, however, that if the Interstate Commerce Commission shall enter an order which contains a modifica-

tion or a condition to the approval of the transaction which adversely affects the rights or privileges of but one party hereto, the party so deprived may accept such condition or modification, and the liability of the other party shall not be altered or changed thereby.

46      16. Insofar as the same is assignable, Stone covenants and agrees to transfer and set over to the Rock Island the good will of the business heretofore operated by the White Line Motor Freight Company, Inc. and White Line Trucking Company. He will also, so far as he is capable of doing so, assign, transfer and set over to the Rock Island the exclusive privilege of using the descriptive name and title "White Line" as a trade name in connection with trucking or motor freight transportation.

17. Stone covenants and warrants that all taxes due the State of Illinois, Iowa, or Nebraska, or any subdivision thereof by reason of operations conducted by the White Line Motor Freight and White Line Trucking Company, accruing prior to the conveyances and assignments to the Rock Island herein provided for, shall be paid by said corporations or by him. Stone will indemnify and protect the Rock Island from any claims, damage, cost or expense which may be imposed upon the Rock Island, or against any equipment specifically transferred to the Rock Island under the terms of this instrument, by reason of any tax on operations prior to the date of the transfers and conveyances herein provided for.

18. Stone covenants to indemnify and protect the Rock Island from any and all liability, cost, damage or expense which may be imposed upon it by reason of any claims or causes of action of any kind or character arising prior to the transfer of the equipment to the Rock Island described on Schedule "B". He covenants to indemnify the Rock Island from any expense or damage incurred in defending against such claims, or in procuring the release thereof, and agrees to indemnify the Rock Island against

47      expense or damage of any kind by reason of any liens which may be created or imposed upon any equipment to be transferred to the Rock Island under the terms of this contract.

### ARTICLE III

1. In the event that this contract and the acquisition by the Rock Island of the property and rights described in Article I are not disapproved by the Interstate Commerce Commission, the Illinois Commerce Commission, or the Iowa

State Commerce Commission, the Valley Savings Bank, as Escrow Agent, shall after paying \$80,000 to May E. Mills, deliver to Rock Island all the outstanding capital stock of the White Line Transfer & Storage Company as provided in the escrow agreement. The Rock Island shall hold said stock as security for the performance by Stone of all the obligations assumed by him under the terms of this instrument, but upon the completed conveyance to the Rock Island of the property hereinbefore described, said stock may be transferred on the books of the White Line Transfer & Storage Company to Stone, but the stock certificates so transferred shall forthwith be delivered to the Rock Island and shall be pledged as security with the Rock Island for the performance of all the obligations assumed or guaranteed by Stone under the terms of this instrument. Stone may sell or assign to third persons any of the stock so held by him, but until the full performance by Stone of all the obligations assumed by him under the terms of this contract,

48 he shall procure the deposit with the Rock Island of an instrument in writing executed by any person who becomes a record stockholder in such corporation, which instrument shall irrevocably pledge the stock as security for the obligations assumed in this agreement by Stone.

2. Stone covenants and agrees that he will pay to the Rock Island the sum of Thirty Thousand Dollars (\$30,000.00) with interest thereon at five per cent per annum, payable semi-annually from the date upon which the stock of the White Line Transfer & Storage Company is released by the escrow agent, as provided in the escrow agreement. Stone shall execute and deliver to the Rock Island, coincident with the execution of this agreement, his four promissory notes, more specifically described as follows:

One for \$7,500.....due May 1, 1939  
 One for \$7,500.....due May 1, 1940  
 One for \$7,500.....due May 1, 1941  
 One for \$7,500.....due May 1, 1942

49 3. In the event that this contract is disapproved by the Interstate Commerce Commission, the Illinois Commerce Commission, or the Iowa State Commerce Commission, so as to prevent the acquisition by the Rock Island of the property and rights upon the terms herein set forth, the Rock Island will, upon Stone's request, surrender to him the four notes hereinbefore described.

4. The record owners, so long as the installments of interest and principal on the notes herein described are promptly met, and so long as Stone performs the obligations and covenants assumed by him under the terms of this contract, shall have the privilege of voting the stock of the White Line Transfer & Storage Company. In the event that Stone shall default in the payment of any installment of interest or principal on any of the notes herein described, then, and in that event the Rock Island shall immediately become entitled to vote the stock of said White Line Transfer & Storage Company at any stockholders' meeting, regular or special, and may elect a board of directors of its own choice for said corporation, and Stone, by this instrument, grants to the Rock Island power and authority to vote his stock in said corporation as his proxy or attorney in the event of default upon the notes or any of them.

5. Stone, so long as any of the notes remain unpaid, shall enter into no contract with the White Line Transfer & Storage Company for his services or fixing his compensation for a period of more than six months. Stone shall have the privilege of paying off the balance due on said notes at any time, and interest upon said notes shall cease at the date of such payment.

6. So long as any of the notes or any portion thereof remain unpaid, the Rock Island shall be furnished with quarterly operating statements and balance sheets certified by a recognized certified public accountant as correctly showing the financial condition of said corporations, under accepted accounting practices, and the Rock Island shall have full access to all the books, records and papers of the corporation upon reasonable demand therefor, so long as any part of the notes remain unpaid.

7. Upon payment of the last of the notes described in this article by Stone, and upon the performance of all of the obligations assumed or guaranteed by him under this instrument, the Rock Island will release to the record owners the certificates of stock of the White Line Transfer & Storage Company.

8. In addition to the privilege of voting the stock of the White Line Transfer & Storage Company in the event of default in payment of interest or principal upon the notes held by the Rock Island, the Rock Island may foreclose the pledge of the stock of the White Line Transfer & Storage Company by an action in equity, as prescribed by the laws

of the State of Iowa, or by notice and sale, in accordance with the Iowa statutes, or the Rock Island may pursue any other legal remedies available to it to recover the amount due upon said notes.

51 9. In the event Stone shall become indebted to the

White Line Transfer & Storage Company in connection with the acquisition or transfer of the assets and liabilities of the White Line Motor Freight Company, Inc. and White Line Trucking Company, any notes executed by Stone to the White Line Transfer & Storage Company shall be pledged with the Rock Island, under the terms of this instrument, and in the event of default by Stone in the payment of principal or interest upon the notes given to the Rock Island, the Rock Island at its option may enforce the obligations of Stone on such notes to the White Line Transfer & Storage Company.

10. In the event Stone becomes in default in the paying of said notes, then before pursuing any of the remedies on said notes or the pledge securing the same said Rock Island shall give Mills written notice of said default and thereafter said Mills shall be under no obligation with respect to said notes or pledge secure the same but may, if she so desires, make good such default and in case she does so, she shall thereby be subrogated to the rights of the Rock Island to the extent she has so made good, in said notes and in the pledge securing the same. In case said Mills pays the principal of said notes after such notice of default, Rock Island shall return said stock securing the same to her and it shall be hers.

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#### ARTICLE IV

Stone covenants that within five days after the release of the stock of the White Line Transfer & Storage Company from the escrow agreement, that company will enter into a contract with the Rock Island in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations, by which the Storage Company will obligate itself to perform the following acts, and accept the following restrictions upon its future business, to-wit:

1. Storage Company will quit claim to the Rock Island any interest it may have in any of the properties which Stone sells or assigns to Rock Island in performance of the terms of this contract, and will execute such instrument or instruments as may be reasonably necessary or convenient to evidence such quit claim.

2. Storage Company will warrant the title of all property sold by Stone to Rock Island under the terms of this instrument, and will hold the Rock Island harmless from all claims of ownership or lien upon any articles of personal property conveyed to Rock Island by Stone or Storage Company, and will indemnify and protect the Rock Island against any loss, damage or expense incurred by reason of such claims.

53 3. The Storage Company will not, for a period of five years after the completed conveyances of the property hereinbefore described, maintain any branch office or place of business at any location except in the City of Des Moines, Polk County, Iowa. The Storage Company may retain its present corporate name and carry on business as the White Line Transfer & Storage Company in Des Moines, Iowa. The Storage Company will cooperate with the Rock Island in the event that inquiries are received by it covering the transportation of freight between points served by the present lines of the White Line Motor Freight Company, Inc. and White Line Trucking Company, and will refer all such inquiries to the Rock Island. The Rock Island may, after the completed conveyances of the property hereinbefore described, continue to carry on the business under the name "White Line Motor Freight Company, Inc.," or "White Line Trucking Company," or similar combinations using the words "White" and "Line" as a descriptive name.

4. That after the execution of the conveyances and assignments herein provided for, the Storage Company will not engage in the business of operating common carrier trucks over regular routes, or between fixed

54 termini for the transportation of any kind of property over any of the highways specified in any of the certificates of convenience and necessity described in Article I hereof; and that after such time, it will not operate common carrier trucks between any of the cities or towns located on any of the routes covered by said certificates of convenience and necessity by any other route, and that it will not engage in the carriage of goods by any traffic arrangement, joint transportation service, or otherwise, so that it is either directly or indirectly a party to any common carrier truck transportation business between any of the cities and towns on any of the routes covered by the certificates of convenience and necessity described in Article I hereof.

5. That after the execution of the conveyances and assignments herein provided for, the Storage Company will not engage in the business of operating trucks or highway transportation vehicles for the general hauling of freight or commodities customarily handled by truck lines, or operate trucks either as a common carrier, a contract carrier, or a truck operator over any of the highways of the states of Iowa, Nebraska and Illinois, between points located on the routes specified in the certificates of convenience and necessity hereinbefore referred to, nor between any of the cities and towns located upon the routes specified in said certificates of convenience and necessity by any other routes.

55      6. That the Storage Company will not after the execution of the conveyances and assignments herein provided for, engage in business in Des Moines, Iowa, either directly, or indirectly, or in any other city or town on the routes specified in the certificates of convenience and necessity and permits hereinbefore referred to, as an agency for the picking up, forwarding, or for the delivery of freight for any person, firm or corporation which operates as a motor carrier of freight, whether under a certificate of convenience and necessity, or under truck operator's permits between any of the points specified in the certificates of convenience and necessity and permits hereinbefore referred to; and that it will not solicit business for any truck operator or truck carrier operating between any of the points specified in said certificates of convenience and necessity.

7. The restrictions set forth in this Article shall not apply to—

(a) The transportation of liquors, supplies and equipment under the terms of an existing contract, or any extension or renewal thereof, between the Storage Company and the Iowa Liquor Control Commission, or under any new contract pertaining solely to the transportation of liquors, supplies and equipment between the Storage Company and the Iowa Liquor Control Commission, or its successor in office or function.

56      (b) The transportation of household goods, office and store furniture, fixtures, stock and equipment, including all articles of property customarily used in the household, when a part of such household equipment or

supply, and the equipment, stock, furniture, stock fixtures and property, including works of art, musical instruments and display exhibits, usual in an office, store, museum, institution, hospital or other establishment, when a part of the stock, equipment or supply of such store, office, museum, institution, hospital or other establishment.

(c) The transportation of heavy equipment and heavy machinery, where special hoists, jacks, winches, cranes or similar devices are required in the loading or unloading of such property for transportation.

(d) The transportation of new automobiles by truck, provided the rates charged for such transportation of automobiles by truck between points located on any of the routes specified in the certificates of convenience and necessity hereinbefore referred to, shall not be less than the then prevailing rates prescribed by railroad tariffs filed with the Iowa Board of Railroad Commissioners and Interstate Commerce Commission, respectively.

57 (e) The transportation under special contracts with retail or wholesale merchants located in Des Moines, Iowa, for the delivery of goods or merchandise sold by said merchants to be delivered to the customers of such merchants at any point within forty miles of Des Moines, Iowa.

(f) The performance of the services or acts which a person or corporation conducting a storage warehouse or a purely local transfer or dray line may by law be now or hereafter compelled to render or perform.

8. Rock Island agrees that it will not go into the general transfer and storage business in Des Moines, Iowa, in competition with the business of the Storage Company, but this limitation shall not apply to the transfer of freight between the depot of The Chicago, Rock Island and Pacific Railway Company in the City of Des Moines, and any other railroad depots, nor to the furnishing of pick-up and delivery service on freight shipments moving via the lines of The Chicago, Rock Island and Pacific Railway Company.

9. Rock Island will not use the words "White Line" connection with "Transfer" or "Storage" in connection with any part of its operations.

10. Rock Island will cooperate with the Storage Company in connection with any inquiries coming to it for the

handling of business which the Rock Island is not in position to care for, and will refer such inquiries to the Storage Company; and the Storage Company shall likewise refer to the Rock Island any inquiries coming to it pertaining to business which the Rock Island is in position to handle; that Rock Island will cooperate with the Storage Company in the collection of accounts due the Motor Freight or Trucking Company.

11. Stone agrees that for a period of three years after the execution of the conveyances herein provided for, he will not either directly or indirectly, as an owner, employee, principal, partner or otherwise engage in any business in the states of Iowa or Illinois which the Storage Company is by the terms of this instrument prohibited from carrying on.

IN WITNESS WHEREOF the parties have caused two counter parts of this instrument to be executed this 4 day of October, 1937.

.....  
*Party of the First Part.*

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
*Party of the Second Part,*

By .....  
*Its President*

## Exhibit B 2

## Exhibit "B"

Schedule of equipment of White Line Motor Freight Company, Inc.,  
and White Line Trucking Company

Unit No.	Description & Model	Motor No.	Chassis No.	License No.	Price
U-1	Mack Tractor	1930 BCE 9-11	6 BC 1S 1552	Nebr. 1C-3068	\$ 990.
U-2	Mack Tractor	1930 BCE 10-14	6 BC 1S 1826	Nebr. 1C-2800	990.
K-3	Int'l Tractor	1934 FBB-3652	641	77-5064	1125.
	Int'l Tractor	1935 FBB-19240	752	77-5140	1260.
K-4	Int'l Tractor	1934 FBB-16997	A-5-6762	111-X-1603	900.
4	Int'l Tractor	1933 FBB-17095	3630	77-5144	810
5	Int'l Tractor	1933 FBB-13864	2954	111-X-1755	765.
6	Int'l Tractor	1933 FBB-14720	6137	77-5120	720.
7	Int'l Truck	1933 FBB-14431	6052	77-5063	990.
14	Ford Truck	1931 AA-4336943	Ford*	77-3697	270.
15	Int'l Tractor	1936 FBB-17925	7364	64-969	540.
17	Dodge Tractor	1931 Z-3452	8760708	77-5370	225.
18	Dodge Tractor	1931 Z-3536	8760733	111-T-2524 (1937)	225.
19	Reo Tractor	1931 4-H-85	209031	77-5372	202.50
33	Int'l Tractor	FBB-16812	7234	111-X-2028	540.
40	Ford Truck	BB-5233595	Ford*	77-3696	247.50
B-44	Chev. Tractor	1935 T-4902539	212 B02 4437	111-T-877 (1937)	270.
B-45	Chev. Tractor	1935 T-4938227	212 B03 4974	111-T-937	270.
B-46	Chev. Pick-up	1935 T-5045237	212 B04 6363	77-230 (1937)	405.

65  
Unit  
No.

Description & Model		Motor No.	Chassis No.	License No.	Price
59	Ford Tractor	1932 AAB-5049824	Ford*	77-5367	\$ 180.
60	Ford Tractor	1932 AAB-5012913	Ford*	77-5365	180.
61	Ford Tractor	1932 AAB-5046062	Ford*	77-5368	180.
63	Ford Truck	1933 BB-5233583	Ford*	77-3695	225.
65	Chv. Truck	1935 T-5058820	21 DQ04 6751	Nebr. 1-L-4481 (1937)	360.
66	Ford Truck	1931 AA-4160344	Ford*	Nebr. 1-L-4482 (1937)	225.
67	Chv. Truck	1935 T-4746209	21 GD011472	77-4027	382.50
70	Chv. Truck	1935 T-5014178	210 D04 5961	77-4216	382.50
71	Chv. Truck	1935 T-4846146	210 D02 3651	77-4063	382.50
135	Ford Truck	1931 AA-4266091	Ford*	77-3693	180.
144	Ford Truck	1931 BB-5241624	Ford*	77-3691	315.
147	Ford Tractor	1934 BB-18-1168531	Ford*	77-3493	247.50
125	Chv. Truck	1930 T-295610	3 NC 11269	77-3694	148.50
148	Ford Tractor	1934 BB-18-638919	Ford*	77-3690	247.50
152	Ford Truck	1935 B-18-1698064	Ford*	77-3689	720.
153	White Truck	1931 4935	175312	77-3688	337.50
170	Mack Truck	1932 BCE-14-100	6 BC 1S 1763	111-X-1756	810.
196	Mack Tractor	1933 BCE-24-36	6 BM 1S 1260	111-T-1492 (1937)	1440.
211	G. M. Tractor	1935 13313614	583	111-T-1493 (1937)	1260.
251	G. M. Truck	1931 1257096	1931 Model	77-3687	225.
252	G. M. C. Truck	1931 1257147	498	77-3686	5430.32—should be 430.32 (Sup. 32.2)
257	Ford Truck	1935 BB-18-1675408	Ford*	111-B-23330 (1937)	622.
259	Ford Truck	1935 BB-18-1863988	Ford*	111-B-23328 (1937)	627.45
260	Ford Truck	1935 BB-18-1557774	Ford*	111-B-23327 (1937)	620.42
261	Dodge Truck	1933 BT-2-6742-B	8488095	111-B-23326 (1937)	382.58
304	Ford Tractor	1935 BB-18-2209614	Ford*	111-T-881 (1937)	626.09

Encumbrance  
or unpaid  
purchase  
price

Unit No.	Description & Model	Motor No.	Chassis No.	License No.	Price	Encumbrance or unpaid purchase price
306	Chev. Truck	1934 T-4681173	21 PD 11 13223	77-229 (1937)	\$ 372.43	None
307	Int'l Tractor	1935 FBB-19733	1217	111-T-1487 (1937)	1286.60	
308	Int'l Tractor	1935 FBB-19731	1218	111-T-874 (1937)	1287.62	
309	Int'l Tractor	1935 FBB-20389	1926	111-X-98	1244.40	
310	Int'l Tractor	1935 FBB-19468	1015	111-T-878 (1937)	1309.31	
311	Int'l Tractor	1935 FBB-20836	2322	111-X-2197	1253.58	
312	Int'l Tractor	1935 FBB-19654	1136	111-T-1490 (1937)	1231.87	
318	Diamond T Tractor	1935 G-514533	F-98919	4-528	512.86	
197	Mack Truck (Diesel)	BCE-10308	6BC-1S 1656	111-T-1494 (1937)	1800.00	
253	Chev. Truck	1935 T-5470607	210 D08 12664	111-B-23333 (1937)	559.23	
254	Chev. Truck	1935 T-5140102	210 D06 9500	111-B-23332 (1937)	558.48	
255	Chev. Truck	1935 T-5140155	210 D06 9504	77-3685	519.99	
301	Chev. Tractor	1935 T-5206030	210 B07 7253	111-T-873 (1937)	550.87	
302	Chev. Tractor	1935 T-5437715	210 B08 12034	111-T-880 (1937)	542.22	
303	Chev. Tractor	1935 T-4951101	210 B05 8587	111-T-879 (1937)	626.57	
306-B	Chev. Tractor	1936 T-6311171	21 RB04 12404	111-T-872 (1937)	793.78	
315	Dodge Tractor	1936 T-27-3520	8512235		998.92	
12	Indiana Van	1929 A-484-67	627 C 119	77-136 (1937)	225.00	
140	Mack Truck	1929 L-9-4	691434	77-3662	1350.00	
155	Dodge Truck	1929 GB-23333	EL 43747	77-3663	225.00	
180	Mack Tractor	1932 BCE-16-14	6 BC 1S 1906	77-3664	1125.00	
201	G. M. C. Jack	1935 12576143	A-46280	77-5141	413.42	
202	I. H. C. Jack	1933 FBB-13156666	A-46280	77-5227	510.00	
69	Dodge Truck	1933 CT-2-13004	E-8493042	77-5439	457.09	
145	Ford Truck	1932 BB 18 173119		77-5229	379.60	

67 Unit No.	Description & Model	Motor No.	Chassis No.	License No.	Price
190	Mack Tractor	1933 BCE-22-18	6 BM 1S 1053	77-5142	\$1305.
195	Mack Tractor	1933 BCE-20-55	6 BM 1S 1138	77-5143	1305.
D-1	D. T. Tractor	1935 L-537258	73293	111-T-1489 (1937)	643.55
D-2	D. T. Tractor	1935 L-531443	71389	62-759	527.22
316	Diamond T. Tract.	1935 L-529507	96505	77-5062	1016.92
BF-1	Mack Tractor	1936 CU-42-41	6BF 1S 1139	111-T-1486 (1937)	2770.70
BF-2	Mack Tractor	1936 CU-42-56	6BF 1S 1141	111-T-1488 (1937)	2765.58
<b>Trailers</b>					
		Serial No.			
G1-A	Fruehauf	E-28929			900.
G2-A	Fruehauf	1930 E-29693			900.
U1-B	Fruehauf	C-24292			1080.
U2-A	Fruehauf	B-21831			810.
K3-A	Fruehauf	1934 31026			900.
K4-A	Fruehauf	1934 31028			900.
4-A	La Peer	4822		3535	405.
5-A	Highway	28397			810.
6-A	W. K. Carry Car	SCDA-137			270.
17-A	La Peer	11531		3536	360.
19-A	Trailermobile	11532		3557	360.
21	La Peer 4 wheel	5109		3300	90.
B-34-A	Highway	1935 27559		111-T-877 (1937)	315.
B-35-A	Highway	1935 26562			315.
59-A	Highway	22624		3554	180.
57-A	Highway	22993		3555	180.
60-A	La Peer	11954		3556	315.
147-A	Fruehauf	1934 E-30071		3423	675.

Unit No.	Description & Model	Serial No.	Chassis No.	License No.	Price
148-A	Fruehauf	1934 E-28902		3427	\$ 675.
149-A	Highway	27369		3299	675.
170-A	Mack	TS-2SA-1080			1260.
191-A	Fruehauf	1931 22902B			720.
196-B	Fruehauf	1934 31025		3454 (1937)	810.
211-A	Fruehauf	1934 31027		111-X-2009	900.
318-A	Highway	1931 28410		111-X-1677	540.
6-B	Highway	29498		3480	1350.
30-A	Fruehauf	1936 F 36884			1170.
196-C	Fruehauf	B 21832		3468	900.
301-A	Fruehauf	1935 F 36222		111-T-873 (1937)	1155.11
302-A	Fruehauf	1935 F 36224		111-T-880 (1937)	1157.89
303-A	Fruehauf	1935 F 36221		111-T-879 (1937)	1157.86
304-A	Fruehauf	1935 F 36220		111-T-881 (1937)	1153.76
305-A	Fruehauf	1935 F 36226		111-T-876 (1937)	1384.30
306-A	Fruehauf	1935 F 36223		111-	1175.30
307-A	Fruehauf	1935 F 36215		111-X-99	1341.32
308-A	Fruehauf	1935 F 36225		111-T-874 (1937)	1145.00
309-A	Fruehauf	1935 F 36216		111-X-98	1158.08
310-A	Fruehauf	1935 F 36219		111-T-878 (1937)	1155.11
311-A	Fruehauf	1935 F 36218		111-X-2197	1130.65
312-A	Fruehauf	1935 F 36217		111-X-2196	1310.65
315-A	Fruehauf	1935 F 36889			1303.77
319-A	Fruehauf	1936 F 36887			1384.49
180-A	Highway	1932 24653		3533	855.00
190-A	Highway	1931 24623		3534	895.28
195-A	Highway	24439		3532	775.80
BF-1A	Fruehauf	1936 F 36888		3464	1530.86*
BF-2A	Fruehauf	1936 F 36886		3465	1441.06*
316-A	Fruehauf	1936 F 36885		111-X-1943	1426.72*

\* These items are included in the \$8,603.05 Encumbrance.

Unit No.	Description & Model	Motor No.	Chassis No.	License No.	Price
<i>Automobiles</i>					
39	1932 Ford V8 Coach				\$ 71.69
46	1934 Master Chev. Coach				272.77
35	1935 Master Chev. 4 Dr. Sedan				458.89
28	1933 Ford V8 Coach				232.65
27	1935 Ford V8 Coach				401.21
	All trucks, automobiles and trailers shall have bodies attached.				
	All tractors shall have fifth wheel attached, and trailers shall have necessary upper fifth wheel attachment.				
	All trucks, tractors, automobiles and trailers shall have one spare tire fully equipped.				

WHITE LINE MOTOR FREIGHT COMPANY  
DAVENPORT, IOWA, INVENTORY

- 1 Safe
- 2 Flat top desks Walnut
- 1 Secretary desk Walnut
- 1 Typist desk
- 1 Office table
- 1 Second hand flat top desk
- 2 Steel files Shaw Walker 4-drawers
- 2 Wheeled typewriter tables—steel
- 1 Remington typewriter
- 1 Underwood typewriter
- 1 L. C. Smith typewriter
- 1 Metal table lamp
- 3 Desk lamps metal
- 1 Empire bill of lading punch
- 2 Ace staplers
- 1 Wheeled tariff file
- 2 Revolving office chairs
- 2 Revolving typist chairs
- 3 Metal waste baskets
- 1 Premier pencil sharpener
- 1 Cardboard desk secretary
- 3 Wooden letter trays
- 2 Wooden card files
- 1 Burroughs Adding Machine—desk type
- 1 Office guest chair straight
- 4 Chair pads
- 2 Floor pads for under chairs
- 1 Electric desk clock
- 3 Dip a day pen and ink well sets
- 2 Steel spindles
- 1 Loose leaf binder deluxe
- 3 Typewriter covers
- 1 Adding machine cover
- 1 Rand McNally standard highway mileage guide
- 1 Winstons Dictionary
- 2 Niagara fold billing attachments
- 2 Dust screens for office windows
- 4 clip style check boards
- 1 Electric fan
- 1 Set tariffs
- 9 Scrip sheet binders
- 6 Metal bill clips
- 6 Steel plates for dock work

- 1 Wooden desk
- 3 Complete drop cord and fittings
- 1 Fairbanks Scale—1000# capacity
- 2 Wire filing baskets
- 1 Time clock
- 2 Duragarde Fire Extinguishers
- 1 Sledge hammer
- 1 Small ax
- 3 Wooden rollers
- 3 Steel rollers
- 1 —10' step ladder
- 1 —3' step ladder
- 1 mop bucket with wringer attachment
- 1 mop
- 2 Cuspidors
- 1 Heating furnace complete w/o air pipe
- 2 Scoop shovels
- 1 — $\frac{1}{2}$  gallon oil measure
- 1 Small hand saw
- 1 Venetian blind
- 3 Roller shades
- 1 Office oil stove
- 2 Steel cash boxes
- 1 Adapter pin
- 1 20' —  $\frac{1}{2}$ " chain & padlock
- 1 Transmission grease pump
- 6 Lockers
- 1 Bulletin Board
- 1 Hand drill
- 1 Brace
- 1 Bolt cutter
- 2 Grease guns

71 WHITE LINE MOTOR FREIGHT COMPANY  
DES MOINES, IOWA, INVENTORY

- 2 Two wheel trucks
- 1 Stand
- 3 Electric Adding machines
- 1 Typewriter desk
- 1 Burroughs Calculator
- 1 Two drawer file
- 1 Rand desk file
- 1 Typewriter desk
- 1 Oak desk
- 1 Four drawer file & Stand

- 1 Chair
- 1 Burroughs typewriter
- 2 Oak desks
- 1 18-drawer file
- 1 4-drawer file
- 1 Burroughs Accounting machine
- 2 Burroughs chairs
- 1 Index rotary
- 1 Utility cabinet
- 2 L. C. Smith typewriters

72            WHITE LINE MOTOR FREIGHT COMPANY  
IOWA CITY, IOWA, INVENTORY

- 1 Two wheeler
- 1 Steel plate 3x3
- 1 150 Extension cord for dock use
- 1 25 extension cord for dock use
- 4 Floor racks wooden
- 1 Staple machine
- 1 Order machine
- 2 Bill clips

WHITE LINE MOTOR FREIGHT COMPANY  
CEDAR RAPIDS, IOWA, INVENTORY

- 1 Small paper board file
- 1 Waste paper basket

73            WHITE LINE MOTOR FREIGHT COMPANY  
ATLANTIC, IOWA, INVENTORY

- 1 Two wheel truck
- 1 Iron skid
- 1 Wooden skid
- 1 Canvas tarpaulen
- 1 Bag of auto chains

WHITE LINE MOTOR FREIGHT COMPANY  
NEWTON, IOWA, INVENTORY

- 2 Heating stoves
- 2 Stove boards
- 1 Crow bar
- 1 Barrel skid
- 3 Flat sheets steel
- 1 small shovel

- 1 Flat top desk
- 1 Roll top desk
- 1 Swivel chair
- 1 Arm chair

74      WHITE LINE MOTOR FREIGHT COMPANY  
CHICAGO, ILLINOIS, INVENTORY

- 1 Flat top desk
- 1 Flat top desk
- 1 4-Drawer steel filing cabinet
- 1 12" spartan fan
- 1 Walnut costumer
- 2 Metal waste baskets
- 2 Walnut swivel arm chairs
- 3 Walnut straight arm chairs
- 2 Metal desk lamps
- 2 Metal ash trays
- 1 Walnut double filing box
- 1 Walnut filing box single
- 1 Walnut card filing box
- 1 Set venetian blinds (3 sections)
- 1 L. C. Smith typewriter
- 2 brass cuspidors
- 1 Imitation leather desk pad
- 1 Small wooden table
- 2—12" round rubber mats
- 1 Imitation leather chair cushion
- 1 Cloth chair cushion
- 1 Small indirect light fixture
- 1 Small Gilbert wall clock
- 4 4-Drawer steel filing cabinets
- 1 Giant pencil sharpener
- 1 Walnut flat top desk-double
- 1 set 1/2 length cotton drapes (6 panels)
- 1 Underwood typewriter
- 3 Chandeliers
- 1 Wooden tariff filing cabinet
- 1 Arvin electric room heater
- 1 Walnut costumer
- 1 Heatrola stove
- 1 12" Artic aire fan
- 5 Swivel chairs—armless
- 4 Metal waste baskets—green
- 1 Burroughs calculator
- 1 Bates numbering machine

- 1 Advance Paid stamp
- 2 Metal file drawers
- 2 Metal cash boxes
- 1 Burroughs adding machine
- 1 Walnut file box
- 1 Mahogany table
- 2 Flat top typewriter desks
- 1 Mahogany secretarial desk
- 1 Small oak table
- 1 Small flat top mahogany
- 1 Wooden assorting file box
- 1 Underwood fanfold bills
- 2 Underwood typewriters
- 1 Ace stapling machine
- 1 Stapling machine Hotchkiss
- 1 Information sign
- 1 Small wooden card file
- 1 Set 4 wire filing basket
- 1 Cardboard paramount desk
- 1 Steel safe (file)
- 1 Steel file cabinet—4
- 1 Heatrola small (drawer)
- 1 Large oak table
- 1 Marvel punch
- 1 Ace staple remover
- 1 Set 3 stamp pads
- 1 Porcelain letter sealer
- 1 Set steel book ends
- 1 Set—6 rubber stamps
- 1 Steel spindle
- (Tariffs)
- 2 National Motor Frt. Classification
- 1 Midwest motor freight tariff & all supplement
- 1 Mo Valley motor freight tariff & all supplement

- 1 CMFA tariff and all supplements
- 1 Wintermute tariff
- 1 Memo tariff
- 1 Set north and south tariff & supplements
- 1 Rail guide
- 1 Way to ship
- 1 Pro Rate chart
- 1 Time clock
- 2 Time card racks

- 2 Metal lamps
- 1 #5 Champion receiving stamp
- 1 Wire filing basket
- 1 Set 5 steel plates
- 2 2-wheel hand trucks
- 2 Wooden checking tables
- 1 4-wheel truck
- 1 4" vice
- 1 Emery wheel
- 1 Electric Drill
- 2 oil cans
- 1 Stove
- 1 Fire extinguisher
- 1 Electric grease gun
- 1 Scoop shovel
- 1 Wheel barrow
- 2 Wooden saw horses
- 1 6 ft. ladder
- 1 12-ton Hydraulic jack
- 1 Mechanic Jack
- 4 Tire wrenches
- 1 chair hoist
- 2 Ext. drop lights
- 1 18" Stillson wrench
- 1 Tow chain
- 1 Air compressor
- 1 Work bench
- 1 6" vice
- 3 Flare pots

76. WHITE LINE MOTOR FREIGHT COMPANY  
OMAHA, NEBRASKA, INVENTORY

- 7 Chairs
- 5 Desks
- 1 Storage filing cabinet
- 3 Letter filing cabinets
- 1 Table
- 1 Gas log
- 2 Waste paper baskets
- 1 Cuspidor
- 2 Electric fans
- 1 Blotter holder
- 1 Ink well
- 1 Typewriter

- 1 Calculating machine
- 1 Adding machine
- 1 Billing machine
- 1 Dock billing machine
- 1 Piece drapery
- 2 Pieces curtains
- 1 Electric clock
- 1 Staple machine
- 1 Step ladder
- 4 Cots
- 3 Mattresses
- 1 Platform scale
- 1 Scoop shovel
- 1 Hammer
- 1 Saw
- 1 Barrel skid
- 2 Pinch bars
- 3 Brooms
- 1 Pulling cable
- 1 Piece log chain
- 3 Meat racks
- 3 Drop cords
- 1 Steel work bench with vice
- 1 Creeper
- 2 Grease guns
- 1 set block and falls
- 2 Steel bill holders
- 1 Set of holder for rates and routes
- 2 Paper file boxes
- 2 Steel file boxes
- 1 Telephone stand
- 1 Pencil sharpener
- 1 Piece 50 foot garden hose
- 1 Sprinkler can
- 1 Sponge
- 2 Steele cash boxes
- 1 2 quart measuring can
- 1 1 gallon measuring can
- 1 1 quart measuring can
- 1 Hydraulic Jack
- 5 Planks

## Exhibit B-2

Encumbrances on equipment of White Line Motor Freight Company, Inc.,  
White Line Trucking Company, and White Line Transfer &  
Storage Company, as of October 4, 1937.

## Trailers

Unit No.	Serial No.	Encumbrance
307-A	F-36215 )	
309-A	F-36216 )	
312-A	F-36217 )	
311-A	F-36218 )	
310-A	F-36219 )	
304-A	F-36220 )	
303-A	F-36221 )	\$1,796.49
301-A	F-36222 )	
306-A	F-36223 )	
302-A	F-36224 )	
308-A	F-36225 )	
305-A	F-36226 )	
196-C	B-21832 )	
30-A	F-36884 )	
316-A	F-36885 )	
BF2-A	F-36886 )	
319-A	F-36887 )	
BF1-A	F-36888 )	
315-A	F-36889 )	

## Trucks

Description	Motor No.	Chassis No.	Encumbrance
BF-1 Mack tractor 1936	CU-42-41	6 BF 1S 1139)	\$1,122
BF-2 Mack tractor 1936	CU-42-56	6 BF 1S 1141)	
197			
Diesel engine for Mack Tractor	6 BC 1S 1566		535.76

90 Before the Interstate Commerce Commission

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—

WHITE LINE MOTOR FREIGHT COMPANY,

INCORPORATED, *et al.*

Docket No. MC-F-445.

Chicago, Illinois, November 19, 1937. 9 o'clock a. m.  
(Standard Time.)

BEFORE: John S. Higgins, Examiner.

Met pursuant to notice.

## APPEARANCES:

Harry E. Boe, 1025 LaSalle Street Station, Chicago, Illinois, appearing for The Rock Island Motor Transit Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company.

W. B. Hurlburt, 812 Valley Bank Building, Des Moines, Iowa, appearing for White Line Motor Freight Company, Inc.; White Line Trucking Company; White Line Transfer & Storage Company; and Lawrence E. Stone.

Floyd F. Shields, 221 West Roosevelt Road, Chicago, Illinois, appearing for Keeshin Motor Express Co., Inc., and National Freight Lines, Inc., both of 221 West Roosevelt Road, Chicago, Illinois.

91 George E. Wiard, 2320 Portland Avenue, Minneapolis, Minnesota, appearing for Merchants Motor Freight, Inc., 2234 University Avenue, St. Paul, Minnesota.

George M. Cummins, Chamber of Commerce, Davenport, Iowa, appearing for Davenport Traffic Bureau.

H. F. Sunberg, Cedar Rapids, Iowa, appearing for Chamber of Commerce Traffic Bureau, Cedar Rapids, Iowa.

C. C. Crouse, Des Moines Chamber of Commerce, appearing for Des Moines Chamber of Commerce, Des Moines, Iowa.

J. J. Brady, Fort Dodge, Iowa, appearing for Brady Transfer & Storage Company.

E. R. Brillhart, (Partner), Atlantic, Iowa, appearing for Atlantic Motor Freight.

\* T. P. Scanlan, 1608 Milwaukee Avenue, Chicago, Illinois, appearing for Pioneer Motor Service, Rock Island, Illinois.

Fred C. Mayer, Clinton, Iowa, appearing for Curtis Companies, Inc.

James A. Gillen, Attorney, appearing for Chicago, Burlington & Quincy Railroad Company, and Burlington Transportation Company, 547 W. Jackson Boulevard, Chicago, Illinois; and Walter McFarlane, Assistant General Attorney, and Russell B. James, Assistant General Attorney,

Chicago, Burlington & Quincy Railroad Company.

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## PROCEEDINGS.

## STATEMENT BY EXAMINER

Exam. HIGGINS: Gentlemen, you will please come to order.

~~Those~~ of you who intend to file appearances will please get the appearance blanks from the reporter and fill them out if you have not already done so.

I would like to tell you at the outset of this hearing that the rules of the Interstate Commerce Commission prohibit smoking in the hearing room at any time. You gentlemen will be expected to observe that rule.

The Interstate Commerce Commission has set before me at this time public hearing of application of Rock Island Motor Transit Company to purchase White Line Motor Freight Company, Incorporated, and White Line Trucking Company, Docket No. MF-F-445.

No copies of the transcript will be furnished gratis to any of the parties. Those of you who desire copies will have to make your own arrangements with the official reporter.

The Interstate Commerce Commission expects this hearing to be conducted with dispatch and propriety.

—Those appearing in a representative capacity must comply with the provisions of the Commission's Rules concerning admission to practice before it. Complete information concerning such rules may be obtained from the Secretary, Interstate Commerce Commission, Washington, D. C.

Furthermore, those entering appearances must indicate whether they are members of a partnership which is a party to the cause; a *bona fide* officer of a corporation which is a party to the cause; or present in a representative capacity. In all cases complete address should be shown on the appearance blank.

If your testimony has been prepared in the form of written questions and answers, copy of such statements should be supplied for the reporter and the Examiner, and the witness directed to refrain from reading at an excessive rate of speed.

In submitting exhibits, sufficient copies should be available to permit of the following distribution by counsel: Original to the reporter; two copies to the Examiner; and one copy to each of opposing counsel and to others who are permitted to actively participate in the case.

When a series of exhibits on the same subject matter is to be offered, it will facilitate matters if arrangement is made in sets and distribution to those entitled to receive them is effected when witness who will offer same takes the stand.

I will now take the appearance for the applicant.

Mr. BOE: If the Examiner please, I want to enter my appearance, Harry E. Boe, on behalf of the applicant, and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as Trustees of the Chicago, Rock Island & Pacific Railway Company.

Of counsel in this matter, on behalf of the applicant and said trustees, are Mr. W. F. Dickinson of Chicago, Illinois; Mr. J. G. Gamble of Des Moines, Iowa, and Mr. A. B. Howland of Des Moines, Iowa.

Exam. HIGGINS: Are there any of the latter gentlemen present?

Mr. BOE: None of them are present this morning.

I might add that I am a registered practitioner before the Interstate Commerce Commission, and duly licensed to practice before the Commission.

Exam. HIGGINS: Are there any interveners in support of the application?

Mr. HURLBURT: If the Examiner please, I desire to enter an appearance, my name being W. B. Hurlburt, 812 Valley Bank Building, Des Moines, Iowa, in behalf of the White Line Motor Freight Company, Incorporated, and the White Line Trucking Company, White Line Transfer & Storage Company and Lawrence E. Stone.

I am not admitted to practice before the Commission, but I have an application pending and authority from the Secretary to appear in this hearing, and associated with me are F. W. Lehmann, Jr., and William Hosfeldt, both of Des Moines, Iowa, neither of whom is present at this hearing.

Exam. HIGGINS: Your appearance will be noted and you will be permitted to participate.

Mr. HURLBURT: Thank you.

97 Exam. HIGGINS: Are there any other interveners in support of the application?

(No response.)

Exam. HIGGINS: No response. Any protestants?

Mr. SHIELDS: If the Examiner please, I wish to enter my appearance, Floyd F. Shields, 221 West Roosevelt Road, Chicago, Illinois, for and on behalf of the Keeshin Motor Express Co., Inc., and the National Freight Lines, Inc., both common motor carriers; general office 221 West Roosevelt Road, Chicago, Illinois.

And also Mr. C. R. Olson, the vice president of both corporations.

I might add that I am admitted to practice as an attorney before the Commission, and Mr. Olson is present at the hearing.

Exam. HIGGINS: In a representative capacity?

Mr. SHIELDS: That is right. I also have one original copy of the petition to intervene, and if the Examiner would like this I will furnish it later as well as copies to interested parties.

Exam. HIGGINS: Of course, it will be insisted that you furnish applicant's counsel with a copy of the petition.

Mr. SHIELDS: I have copies, but not originals.

Exam. HIGGINS: Very well, the record will show that you have furnished copies of your pleadings to other counsel of record.

98 (Intervening petition filed.)

Exam. HIGGINS: Any objection, Mr. Shields, to telling me at the outset just what your position is?

Mr. SHIELDS: Our position at the outset is as a protestant. However, we would prefer to wait until further on in the hearing as our interests may appear as a protestant.

Exam. HIGGINS: You have alleged that the acquisition here involved would not be consistent with the public interest. Are your clients in competition with the Rock Island Motor Transit Company?

Mr. SHIELDS: We are in direct competition as to territory, as to routes, and as to points served. There are some aspects of the application as filed that we feel are decidedly not in the public interest. I might cite them, if the Examiner would care to have me do so at this time.

Exam. HIGGINS: I just wanted to get the issues well defined, was all, so I will not call for that at this time.

Mr. SHIELDS: Yes, sir.

Exam. HIGGINS: Have you concluded?

Mr. SHIELDS: Yes, sir.

Exam. HIGGINS: Are there any persons here representing any public organization or organizations who want to be heard?

(No response.)

Exam. HIGGINS: No response.

99 Mr. CUMMINS: Mr. Examiner, several of us are appearing here as Chambers of Commerce.

Exam. HIGGINS: Are you going to appear as witnesses or as representatives of the respective Chambers of Commerce?

Mr. CUMMINS: I would like to appear as a witness.

Exam. HIGGINS: I think we can take care of that situation as a witness.

Mr. BOE: Yes, I intend to call them as witnesses, as we proceed.

Exam. HIGGINS: Yes. Now, is there any one here who did not receive notice of this hearing, but who nevertheless believes he has such an interest as would entitle him to appear and be heard?

(No response.)

Exam. HIGGINS: No response.

Is there objection by any party to making the application and exhibits attached thereto a part of the record?

Mr. BOE: No, your Honor, and I wanted to move, and I do so move at this time, that the application, with all the exhibits, including the agreement therein referred to, be incorporated herein and made a part of this record.

Exam. HIGGINS: Have you any objection to that, Mr. Shields?

Mr. SHIELDS: I have no objection insofar as to what information that may contain is concerned, but not as conclusive proof of the statements therein made.

Exam. HIGGINS: The official docket containing the  
100 application and the exhibits attached to the application is before me now, and available for examination or cross examination as the case might be. You will have full and complete access to all of the material stated therein, Mr. Shields.

The application and exhibits attached to the application will be made a part of the record.

I understand, Mr. Boe, that you were required to file a supplemental map?

Mr. BOE: That is true.

Exam. HIGGINS: Showing the complete operation of the railroad?

Mr. BOE: Correct.

Exam. HIGGINS: That does not appear to be included in the docket which I have here. I suppose because it was sent in after the docket had been dispatched to me at Chicago, but if and when it is received it will be considered as an exhibit and made a part of the record.

Mr. BOE: That is true, your Honor, I have had a request from the Secretary of the Commission to submit a copy in lieu of the one that was originally filed with the application, as Exhibit A-5-(a), and such revised map was submitted to the Commission with my communication of October 27, 1937, together with sufficient copies necessary for the Commission's use.

Exam. HIGGINS: If the Interstate Commerce Commission  
101 should at some future time require additional information in connection with this proceeding which can be furnished in convenient form, such as affidavits, depositions, or explanatory exhibits, will you agree to furnish them without the necessity of a further hearing, and unless, of course, the requested information is of such magnitude that further hearing is necessary?

Mr. BOE: The applicant will so stipulate.

Exam. HIGGINS: Are you ready to proceed?

Mr. BOE: I am ready to proceed.

Exam. HIGGINS: Call your first witness.

Mr. BOE: I will call Mr. W. F. Peterson.

W. F. PETERSON was sworn and testified as follows:

Direct Examination.

Mr. BOE: Before proceeding with Mr. Peterson's examination, I should like to have identified an exhibit which I now hand the reporter.

The reporter has marked this document as Applicant's Exhibit 1.

This is a certified copy of orders of the United States District Court for the Northern District of Illinois, Eastern Division, in the proceeding in that court entitled: "In the matter of The Chicago, Rock Island & Pacific Railway Company, Debtor, No. 53209." This exhibit includes a certified copy of an order entered on June 7, 1933, in this proceeding; it includes a certified copy of an order entered on June 8, 1933; it includes a certified copy of an order entered on November 22, 1933; and it includes a certified copy of an order entered on December 28, 1933.

The order entered on November 22, 1933, refers to the appointment of Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees, in the proceeding to which I have referred.

The order entered on December 28, 1933, refers to the permanent appointment of said individuals as trustees for such railway company.

I now offer this exhibit as Applicant's Exhibit No. 1.

Exam. HIGGINS: Has this been included as part of the application?

Mr. BOE: No, sir, it has not. I have included a certified copy of an order of that court with respect to this particular application, but this refers to the general reorganization proceedings of the railway company, and I have copies that I can supply to other parties to the record if they wish them.

Exam. HIGGINS: Any objection, Mr. Shields?

Mr. SHIELDS: May I ask Mr. Boe, are there any orders in that exhibit relating to the transaction in this matter assigned for hearing today?

Mr. BOE: No, sir, if you will recall, they all refer to orders entered in 1933, June 7th, November 22nd and December 28th, I believe, 1933.

103 Mr. SHIELDS: I would not care for any copies of that.

Exam. HIGGINS: The matter just identified by counsel will be received in evidence as Applicant's Exhibit 1.

(Applicant's Exhibit 1, received in evidence.)

Mr. BOE: In connection with the Examiner's question, I want to say that attached to the application as an exhibit is an order—certified copy of a petition and order in the proceedings I have just mentioned, the petition having been filed on October 4, 1937, and the order entered on the same date, this petition and order referring to the proposed acquisition of the property and operations of the rights of the White Line Motor Freight Company, Inc., and the White Line Trucking Company.

I might say incidentally that this order refers to another motor vehicle operation proposed by the trustees of The Rock Island Railway Company which is not involved in this proceeding in any respect whatsoever. If counsel wish to have copies of the order which I have just referred to now, I will be glad to supply them.

Mr. SHIELDS: I would like a copy.

Exam. HIGGINS: The documents to which you have just made reference to are in evidence, because they are attached to the application?

Mr. BOE: That is as I understand the matter.

May I make this further observation at this time, your Honor, that there may come statements or it may appear at some time in this proceeding that the White Line Motor Freight Company or the White Line Trucking Company have engaged in business in other states than are referred to in this application. I have specific reference to the States of Indiana and Michigan, and there may be some other states in which it might appear that some operations have been or are conducted by the White Line Motor Freight Company or the White Line Trucking Company. I want to say, however, for the record that there is no intention in this proceeding by the applicant to attempt to acquire any rights of the White Line Motor Freight Company or the White Line Trucking Company except those that are specifically referred to in this application.

I want further to say that insofar as any of the corporations here involved, namely, White Line Motor Freight,

Company, Inc., and White Line Trucking Company, are identified with any contract carrier operation, it is not the purpose of the applicant or, indirectly, the trustees of The Chicago, Rock Island & Pacific Railway Company to attempt to conduct any contract carrier operations heretofore conducted by either the White Line Motor Freight Company, Inc., or the White Line Trucking Company.

Should the Commission authorize the acquisition it is proposed that the applicant, and insofar as it would be lawful, the trustees of The Chicago, Rock Island & Pacific Railway Company, will conduct the common carrier operations, or confine their operations to common carrier service.

105      **Exam. HIGGINS:** If the Interstate Commerce Commission should find that the White Line Motor Freight Company or the White Line Trucking Company have contract rights, what would happen to those?

**Mr. BOE:** They are to be abandoned insofar as the applicant is concerned. It will abide by any order of the Commission with respect to divestment that the Commission may direct, or if there is no specific direction in the record, such rights will be abandoned.

**Exam. HIGGINS:** Would the White Line Motor Freight Company, Incorporated, or the White Line Trucking Company agree to abandon those rights?

**Mr. BOE:** That is true. I might say in this connection, that the transaction contemplates the dissolution, upon confirmation of this transaction, of the corporate identity of both White Line Motor Freight Company, Incorporated, and White Line Trucking Company. That is covered under one of the conditions of the contract, that upon complete acquisition of the stock, the other party to the contract, namely, Lawrence E. Stone, shall call a stockholders' meeting and proceed to dissolve the White Line Trucking Company and White Line Motor Freight Company.

**Exam. HIGGINS:** And that would actually carry with it the extinguishment of the contract rights?

**Mr. BOE:** That is as I understand it.

106      **Exam. HIGGINS:** Very well.

**Mr. BOE:** I might add, if your Honor please, that there is no intention insofar as interstate transportation is concerned, for the applicant, or indirectly the trustees of the Chicago, Rock Island & Pacific Railway Company, to attempt to conduct any motor carrier operations to intermediate points between Chicago, Illinois, and Rock Island,

Illinois, which are points local to some other line of railroad, and are not on the line of road of The Chicago, Rock Island & Pacific Railway Company.

Exam. HIGGINS: Did I understand you to say you did not propose to serve points intermediate between Chicago and Rock Island?

Mr. BOE: To be specific, East Moline, Illinois, and, as I understand, that is where the highway is over which the White Line Company operates its trucks and parallels the line of railroad of the Rock Island and parallels more or less generally other lines into Chicago, and since the Chicago, Rock Island & Pacific Railway Company has lines of railroad into the so-called Tri-Cities, namely, East Moline, Moline, Rock Island and Davenport, it is not the purpose of the applicant or indirectly the trustees of The Chicago, Rock Island & Pacific Railway Company, to abandon any rights that the White Line Motor Freight Company or White Line Trucking Company may have in those cities, to conduct transportation into or from  
107 those cities. The service is not to be conducted to any local point between East Moline and Chicago which is not on the line of The Chicago, Rock Island & Pacific Railway Company.

May it be understood also that if I or any of the witnesses refer to Tri-Cities that term designates the area of East Moline, Moline and Rock Island, in Illinois, and Davenport, in Iowa. I am reminded that Silvis, Illinois, is also included in that designation.

Q. (By Mr. BOE) Mr. Peterson, your name is W. F. Peterson?

A. Yes.

Q. What is your address?

A. Kansas City, Missouri.

Q. And what is your business or occupation?

A. In charge of the bus and truck department of the Rock Island Railroad.

Q. And when you refer to the Rock Island Railroad you mean the business as conducted by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees of The Chicago, Rock Island & Pacific Railway Company, is that true?

A. Yes.

Q. And how long have you been connected with the trustees of The Chicago, Rock Island & Pacific Railway?

A. Since January 20th, 1937.

Q. And prior to that time what was your business or occupation?

A. As a common carrier operator in the State of Kansas.

108 Q. Where did you have your principal place of business while you were conducting such operations?

A. At Hutchinson, Kansas.

Q. And can you just refer briefly to the territory that you served in the conduct of that type of business?

A. The southwest quarter of the State of Kansas, part of Oklahoma, and at one time part of Colorado.

Q. Did you have anything to do with the negotiations leading up to the signing of the contracts which are now before the Interstate Commerce Commission for consideration in this proceeding?

A. Yes, I did.

Q. Are you familiar in a general way with the territory that is involved, through which the Chicago, Rock Island & Pacific Railway owns lines of railway?

A. Yes.

Q. Between Chicago and Omaha?

A. Yes.

Q. And are you familiar in a general way with the territory between Chicago and Omaha through the Tri-Cities and Des Moines?

A. Yes.

Q. In which the White Line Motor Freight Company and White Line Trucking Company conduct business?

A. Yes.

109 Q. Are the points located on the routes of the White Line Trucking Company and the White Line Motor Freight Company in this territory essentially territory that is served by lines of railway of the Chicago Rock Island & Pacific Railway Company?

A. Yes.

Q. At this time I will ask you to proceed to give your testimony with respect to this transaction, insofar as you have had connection with the consummation of the negotiations leading to the execution of the contracts now before the Commission for consideration.

Q. Prior to accepting employment with the Trustees of The Chicago, Rock Island & Pacific Railway Company—

Q. Pardon me, Mr. Peterson, but will you heed the admonishment of the Examiner to read slowly and sufficiently loud so that the reporter may hear and the Examiner

may hear, and everybody else who has interests in the proceeding may hear what you are saying.

A. Yes, sir.

—and for approximately nine years I had been engaged in the business of carriage of property by motor vehicle within the State of Kansas, having headquarters at Hutchinson, Kansas, and operating routes with a total mileage of about 850 miles. As such a carrier, I was engaged in the general transportation of property, having interchange arrangements at various points with other  
 110 motor carriers in order to provide joint through service. This business was of a common carrier nature. A portion of the routes over which I have conducted operations will, if approved, be transferred to the trustees of The Rock Island Railroad under a lease and operating agreement now the subject of application to the Interstate Commerce Commission under Docket No. MC-F-183. A recommended order was released by the Interstate Commerce Commission on October 29, 1937, authorizing the transaction subject to specified conditions. The remaining routes have been disposed of to other parties not connected with the Rock Island Lines.

The Rock Island Motor Transit Company, which is the applicant herein, was incorporated on April 20, 1927, under the laws of Illinois, and its stock is wholly controlled by the trustees of The Chicago, Rock Island & Pacific Railway Company. For some time after its incorporation The Rock Island Motor Transit Company conducted, under a certificate of the Illinois Commerce Commission, a motor carrier service between Chicago, Illinois, and Blue Island, Illinois, and intermediate freight stations on the line of the Rock Island railroad, in the Chicago terminal area. Operations were temporarily suspended by leave of the Illinois Commerce Commission on October 19, 1932, and The Rock Island Motor Transit Company at this time is not actively conducting any transportation service.

The object for which The Rock Island Motor Transit Company was incorporated, as evidenced by its  
 111 certificate of incorporation, attached to the application, is the transportation, either as a private or common carrier, of persons and property of all kinds by truck, bus, car, or other vehicle over streets and highways in any state or states in the United States.

The applicant has been qualified to engage in business in the State of Iowa, such qualification having been accomplished on November 27, 1929. In this connection atten-

tion is directed to the provisions of Section 49 (a), Chapter 114 of Illinois Revised Statutes, 1937, and Section 7945-cl of the Code of Iowa, 1935, both of which are to the effect that a railroad corporation may acquire, own and operate motor vehicles for the purpose of transporting persons and property over the public highways for hire and that railroad corporations may acquire and own the capital stock and securities of corporations organized for or engaged in such business. In so far as I am informed, there is no prohibitory law in Nebraska against control, direct or indirect, by a railroad company of a motor carrier.

The Chicago, Rock Island and Pacific Railway Company was incorporated on June 3, 1880, and its charter was renewed on June 2, 1930, the states of incorporation being Illinois and Iowa. As shown by certified copy of court orders offered here as exhibits, trustees were appointed for said railway company effective December 1, 1933, and the railway properties have since said date been operated by such trustees.

The map attached to the application as Exhibit B-7 (f) shows the lines of railroad of The Chicago, Rock Island and Pacific Railway Company and also the routes of the White Line Motor Freight Company.

As of December 31, 1936, total railroad mileage operated by Rock Island Lines was 11,884.57 miles. This mileage is located in fourteen states. The present railroad system of the Rock Island is founded upon operations commenced more than 80 years ago and operations of Rock Island Lines between Chicago, Illinois, and Omaha, Nebraska, extending through the Tri-Cities and Des Moines have been in effect for more than 65 years.

I have made a survey of the business conducted by White Line Motor Freight Company and White Line Trucking Company and took an active part in negotiations leading up to the execution of the contracts now submitted to the Commission for consideration.

I believe that the transaction is an expedient one both from the viewpoint of public interest as well as the Rock Island railroad. It has been established that during the past several years there has been a substantial decrease in the volume of less than carload tonnage upon Rock Island Lines. The line of the Rock Island between Chicago and Omaha, through the Tri-Cities and Des Moines, and including segments extending to Muscatine and Cedar Rapids, is included in this reduction.

It is my conclusion that while some of this loss may be ascribed to economic conditions, nevertheless substantially the larger portion of such reduction in tonnage may be traced to competition from motor carriers. Apart from the difference in rates between rail and highway service I am of the opinion that such losses might also be traceable to inadequacy of service by railroad. Some of the considerations which prompt the undertaking by the applicant and the trustee of The Chicago, Rock Island and Pacific Railway Company to engage in motor carrier service between Chicago and Omaha upon the routes of the White Line that serve common points are:

The likelihood that an improvement in service may be achieved by providing later departure at points of origin, earlier arrivals and deliveries to consignees, and more frequent schedules at many points which under existing railroad service are of a limited character.

Operating economies in both railroad and truck operations may be effected without adversely affecting service.

Equipment will be acquired which may be used at other points where the trustees of the Rock Island proposed to engage in motor carrier activities.

Applications covering some of these activities are now pending with the Interstate Commerce Commission  
114 and are as follows:

Between Kansas City, Missouri, and St. Joseph, Missouri, via Leavenworth and Atchison, Kansas.

Between Herington and Hutchison, Kansas.

Between Eldon, Iowa, and Trenton, Missouri.

Between Eldon, Iowa, and Trenton, Missouri.

Between St. Joseph, Missouri, and Herington, Kansas.

Between Hutchison and Dodge City, Kansas.

In addition, my investigation indicates that at numerous points on the route between Chicago and Omaha the Rock Island Railroad has existing facilities at stations which might be utilized to advantage in the performance of a motor carrier service. At some of these points existing railroad facilities are not used to maximum capacity and could be available for motor carrier operations. Agencies are maintained at practically all stations on the railroad of the Rock Island in this territory, and the station buildings could be used for the receipt and delivery, as well as storage, of freight moving in motor carrier service, thus providing protection against heat, cold, rain or snow, as well as pilferage and theft. The personnel of the railroad, besides the agents at the various points, such as freight handlers,

solicitors, policing agents, accounting and supervisory forces, could be made available in order to promote the efficient transaction of business.

Where existing service by railroad is deficient at the present time, improvement in service might be offered either in the form of a coordinated or so-called rail-truck service or by a wholly operated motor service. The shipper should be afforded the opportunity of availing himself of service entirely by truck at rates that are comparable with competing motor carriers, and the shipper should likewise have the opportunity of availing himself of an improved rail service resulting from a coordinated operation at rail rates and under the privileges of the uniform bill of lading now in effect upon the Rock Island Railroad in connection with its numerous connecting rail carriers. There would be innumerable instances, in my judgment, where it would be practical to offer a service, either wholly by motor carrier or partly by rail and partly by motor carrier, superior to that now in effect via the Rock Island lines or the service of the White Line Companies in the territory here involved.

Insofar as C.O.D. shipments are concerned, my experience has been that in many instances shippers hesitate to avail themselves of this privilege because of the lack of confidence in the stability or integrity of some motor carriers. With the direct or indirect control in such an institution as The Chicago, Rock Island and Pacific Railway Company, I believe such lack of confidence would be eliminated and that shippers would avail themselves of the C.O.D. privilege more frequently both with respect to shipments moving entirely in Rock Island service and those interchanged with connecting motor carriers.

I believe also that the experience of the freight claim department of the railway company in the matter of investigation and prompt and fair disposition of shipments damaged or lost in transit may be helpful in disposing of such claims in so far as motor carrier operations are concerned. The Rock Island has had some experience in connection with motor carrier activities which have produced encouraging results. I refer particularly to the operation between St. Joseph, and Kansas City, Missouri, which was inaugurated in May, 1934, and has been continuously in effect. Records indicate that during the first week of this new service the tonnage averaged 13,881 pounds per day. This figure immediately increased. During the first ten months of 1937 the tonnage averaged 20,683

pounds per day. In addition, this coordinated service resulted in an improvement in schedules by enabling earlier deliveries of at least 24 hours.

It is pertinent to refer to the purchase price as well as the provision of the agreement which calls for a loan to Lawrence E. Stone, the other party to the transaction, in the amount of \$30,000 represented by his four promissory notes for \$7,500 each to be repaid on or before April 1, 1941.

I have made a careful study of all of the equipment in the way of trucks, trailers, tractors, office furniture and various chattels listed in the schedules attached to the agreements. On the whole this equipment and various  
117 articles of personal property are in reasonably good condition and under the terms of the contract the equipment must be delivered in good serviceable condition. In my opinion the purchase price of \$50,000, with the obligation on the part of the applicant to assume an amount not in excess of \$9,400 as installments still due on purchase contracts, is a very low price for the equipment and other personal property to be acquired.

While I recognize the view that operating rights are not ordinarily saleable, it is my opinion that such operating rights as are now enjoyed by the White Line companies have a substantial value, and that their acquisition by the Rock Island would be of material benefit. The White Line companies have been in business sufficiently long to have developed a good business and undoubtedly possess an item of good will.

The question might be asked as to that provision in the contract which calls for a loan to the vendor of \$30,000, and in order to answer this question certain facts must be borne in mind.

The While Line Transfer and Storage Company, which is the parent company and engaged primarily in local transfer and storage business at Des Moines, caused to be created the White Line Motor Freight Company, Inc., and White Line Trucking Company, whose properties are sought to be acquired in this transaction. The capital stock of these

three companies is now and has been owned and controlled by an elderly widow, Mrs. May E. Mills of  
118 Des Moines, whose deceased husband originated the business. Mr. Stone has been directly connected with these companies for approximately twelve or thirteen years. Mrs. Mills, so I understand, had decided to dispose of her owner-

ship of the stock of these three companies. She was unwilling to dispose of this stock except as a unit.

At the time the Rock Island commenced negotiations toward the acquisition of the properties of White Line companies the other party to this transaction, namely, Lawrence E. Stone, held an option to acquire all of the capital stock of the three companies in question. The purchase price of this stock, so I am informed, was \$80,000. Mr. Stone indicated to the representatives of the applicant that he desired to retain the business conducted by the White Line Transfer and Storage Company but would be willing to dispose of the properties of the White Line Motor Freight Company and White Line Trucking Company on the basis indicated in the contract. While I, of course, have no particular information as to this point, I understand that Mr. Stone requires the sum of \$30,000 in order to consummate his side of the transaction, namely, the purchase of the stock of the White Line Transfer and Storage Company. At any rate, Mr. Stone's proposal was conditioned upon an advance to him of \$30,000 in order to enable his acquisition of the capital stock of the White Line Transfer and

Storage Company, and in view of the favorable terms  
 119 upon which the properties of White Line Motor Freight Company and White Line Trucking Company could be acquired, it was concluded that the transaction ought to be consummated in the manner outlined in the contracts now submitted to the Commission for consideration.

In so far as the advance of \$30,000 to Lawrence E. Stone is concerned, it will be observed that the contracts provide for adequate collateral in the form of the pledge of the capital stock of White Line Transfer and Storage Company until all obligations with respect to repayment of said advance have been discharged. White Line Transfer and Storage Company, as will be reflected by financial statements in evidence in this proceeding, possesses sufficient assets to protect the applicant in connection with the advance to Mr. Stone of \$30,000.

From the particular references in my earlier testimony I believe it has been demonstrated that the proposed acquisition is consistent with that provision of Section 213 of the Motor Carrier Act dealing with the use by a railroad of motor carrier service to public advantage. An acquisition which will enable a railroad company to improve its service and provide more efficient transportation which will inure

# MICRO

TRADE



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MARK 

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to the benefit of the shipping public, in my opinion, is entirely consistent with the declaration of policy in the Motor Carrier Act, and specifically with Section 213 thereof.

This acquisition, I submit, is of that character.

120 With reference to the clause of Section 213 of the

Motor Carrier Act, that there shall be no undue restraint of competition, I may observe that numerous motor carriers not in any respect affiliated with this railroad or any other railroad are now in active competition with the White Line Motor Freight Company and The Chicago, Rock Island and Pacific Railway Company between Chicago and Omaha, the Tri-Cities, Des Moines, and other points. Furthermore, other railroads serve this territory, such as the Chicago, Burlington & Quincy Railroad Company with its motor affiliate Burlington Transportation Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Illinois Central Railroad Company; Chicago and North Western Railway Company; Chicago Great Western Railroad Company; and the Wabash Railway Company. All of these railroads provide service between Chicago and Omaha and are in active competition with The Chicago, Rock Island and Pacific Railway Company. The Burlington and Milwaukee serve the Tri-Cities. The Wabash, Milwaukee, North Western, Burlington and Great Western all serve Des Moines. It would be unwarranted, in my opinion, to hold that the proposed acquisition would to any extent unduly restrain competition in the territory here involved, so I cannot see that the proposed acquisition conflicts with the mandate of section 213, that an acquisition shall not unduly restrain competition.

For the record I wish to say that, insofar as interstate commerce is concerned, it is not the intention of the applicant or the trustees of The Chicago, Rock Island and Pacific Railway Company to serve any points between Chicago and East Moline, Illinois, through which trucks of the White Line companies now operate and which are points on the Burlington Railroad or some other railroad than the Rock Island. Furthermore, it is not proposed by the applicant, or, indirectly, the trustees of The Chicago, Rock Island and Pacific Railway Company, to conduct service at any other point on the route of the White Line companies that are not now served by the railroad of the Chicago, Rock Island and Pacific Railway Company.

I wish further to add for the record, in so far as interstate transportation is concerned, that it is not the intention of the

applicant or the trustees of The Chicago, Rock Island and Pacific Railway Company, to engage in any of the contract carrier operations now conducted or heretofore conducted by the White Line Trucking Company, it being contemplated that the service to be conducted by the applicant and the trustees of The Chicago, Rock Island and Pacific Railway Company will be of a common carrier nature.

I desire to correct a typographical error on the first page of Exhibit B-2 to the application. Unit No. 252 being GMC truck motor No. 1,257,147, shows a price of \$5,430.32. This figure should be corrected to \$430.32.

122 The agreements identified as Exhibits B-1-(a)-(1) and B-1-(a)-(2) to the application filed in this proceeding, which form the basis of this transaction, have been duly signed by the parties hereto, and in accordance with the provisions of the escrow agreement which is Exhibit B-1-(a)-(2) to the application, The Rock Island Motor Transit Company has deposited with the Escrow Agent, Valley Savings Bank of Des Moines, the amount of \$80,000 as required, and the other party to the transaction, Lawrence E. Stone, has caused all the certificates for the capital stock of White Line Transfer and Storage Company, White Line Motor Freight Company and White Line Trucking Company to be deposited with the Escrow Agent. The deposit of the money and shares of stock was accomplished on October 7, 1937.

Mr. BOE: Cross examine.

#### Cross Examination.

Q. (By Mr. SHIELDS) Mr. Peterson, you spoke in a general way, of a plan of coordination between the Rock Island Railroad and the White Line operations. Have you formulated a definite, specific plan of coordination?

A. There has been no definite plan as yet formulated.

Q. Do you know what Rock Island stations or terminals will be used by the motor carrier operations?

A. No.

Q. Do you have any plan as to alternation of motor carrier schedules and rail schedules?

123 A. Not generally, no.

Q. Referring now to your Des Moines terminal, that is your rail terminal at that point to handle additional motor carrier passengers?

A. Yes.

Q. How long has that condition existed at the Des Moines terminal?

A. That I am not familiar with.

Q. How long have you been surveying this operation?

A. For approximately the last six months.

Q. And is it your opinion that you have sufficient facilities there within the last six months to handle additional motor carrier passengers?

A. Yes.

Q. Now, you spoke of the lack of confidence of shippers in common motor carriers as to the proper handling of C.O.D. shipments. Have you heard or do you have any knowledge of lack of confidence in the National or the Keeshin operations as to the proper handling of C.O.D. shipments?

A. No, I have not.

Q. As far as you know, they handle them properly and there is no lack of confidence in those two organizations?

A. Yes, that is correct.

Q. Now, you had as an example, the motor carrier 124 - operations between St. Joseph, Missouri, and Kansas City as now conducted by the Rock Island railroad. As a matter of fact, are those operations conducted by the Rock Island?

A. Yes, I would say they are.

Exam. HIGGINS: The Rock Island railroad?

The WITNESS: The Rock Island railroad, yes, sir, under their specific management.

Q. (By Mr. SHIELDS) Who does conduct the actual physical operations of the vehicles themselves?

A. The Rock Island, having a contract with the Crooks Terminal Warehouse Company for the actual physical operation.

Q. And as to what rights might exist under the Federal Motor Carrier Act and the grandfather clause of the Federal Motor Carrier Act on those operations, who has filed that application?

A. The Rock Island railroad has filed an application.

Q. Is there any other application that covers the same operation?

A. I understand that the Crooks Terminal Warehouse have also filed an application.

Q. And have either or both of them been heard?

A. The informal hearing has been heard—well, yes, they have both been heard informally, at least.

Q. Has there been any order issued by the Commission?  
A. Not to my knowledge.

125 Q. I gathered from your statement that that portion of the consideration that was to be considered as payment for the physical equipment is in the amount of \$9,000?

A. That is the unpaid installments on equipment.

Q. What portion of the total consideration is in payment of the physical equipment, physical property?

A. Well, \$9,000—well, \$59,400 includes the operating rights and the physical equipment. There has been no distinction drawn between the operating rights or the physical equipment.

Q. In determining the value of these operations, you undoubtedly have made some allocation as to the value of the various items, haven't you? Did you make some rough estimate?

A. I would not be in a position to make a statement in connection therewith.

Q. Now, the \$30,000 that was advanced by the trustees of the railroad connected with the Transfer & Storage Company, is that a part of the total consideration, or in addition thereto?

A. That is in addition to what we are buying.

Q. Is not that then in the nature of a separate transaction from this matter pending here?

A. It is a part of this contract.

Q. You are not acquiring any of the assets or any of the operations or any of the business of the Transfer & Storage Company, are you?

126 A. No, we are not.

Q. What interest would the trustees of the railroad company have in the business that would warrant the advance of that amount of money?

Mr. BOE: I am going to object to this question, because counsel's question is prefaced on nothing that has been brought out in direct examination. He is assuming that this proposed loan is to the White Line Transfer & Storage Company, and according to the witness' testimony he refers to the advance to the other party to the transaction, namely, Lawrence E. Stone.

Mr. SHIELDS: Now, therein the Storage Company is a party to the contract, isn't it, or to the oral agreement?

Exam. HIGGINS: All right, I should call it either.

Now, can't you tell Mr. Shields why this arrangement was made, if you know?

The WITNESS: This arrangement was made due to the fact that Mrs. May E. Mills would not sell any one of the three corporations, in fact, she insisted on selling all of them at one time, in one transaction. Due to that fact we advanced the additional \$30,000 to Lawrence E. Stone that he might be in a position to complete the transaction.

Exam. HIGGINS: Does that answer your question?

Mr. SHIELDS: That is an answer to this question, yes.

Exam. HIGGINS: And just at this point I understand Mr. Stone will repay the advance of the \$30,000 through

127 giving these notes?

The WITNESS: Yes, he will give four promissory notes of \$7,500 each, payable annually each year until 1941, at which time all four of them will have been paid.

Exam. HIGGINS: So that when they are ultimately paid the out of pocket expense to the applicant, or the Rock Island railroad, will be \$59,400, and only involve the rights and property, whatever it is, of the White Line Motor Freight Company, Incorporated, and White Line Trucking Company?

The WITNESS: That is correct.

Exam. HIGGINS: Is that clear, Mr. Shields?

Q. (By Mr. SHIELDS) Is that the only way that the transaction could be consummated, if you know?

A. As far as I know, it is.

Q. Now, turning to that part of the assets or that part of the consideration that would be applied to the rights of the White Line, whatever that portion may be, how was that determined, insofar as to what those actual rights are?

A. I don't quite understand your question.

Q. As a matter of explanation, the applications of the White Lines under the grandfather clause of the Motor Carrier Act have not been finally determined, have they?

A. They have not.

Q. And therefore the rights to the White Lines have not been finally determined?

128 A. They have not.

Q. Now, how could a consideration be determined as to what those rights are worth, when you do not know what they are?

Mr. BOE: I object to that. That is argument and not proper cross examination.

Exam. HIGGINS: If Mr. Peterson knows anything about it I will let him answer.

The WITNESS: We are acquiring whatever rights the White Line Motor Freight Company may have.

Exam. HIGGINS: Under its grandfather rights?

The WITNESS: Under its grandfather application.

Q. (By Mr. SHIELDS) Now, I understand you do not intend to operate or conduct any motor carrier operations that are not parallel to or are a part of the Rock Island railroad? You may furnish some trucks to the White Line Storage required for storage operations, I think you said, but you do not mean that, do you?

A. No, the White Line Motor Freight and the White Line Trucking Company—

Q. Now, pardon me for interrupting again, but what do you intend to do with those rights to and from points that are not on the Rock Island Railroad?

A. We intend to divest ourselves of any rights into any points as far as interstate commerce is concerned, that are not points on the Rock Island & Pacific Railway Company.

129 Exam. HIGGINS: Is that quite correct? Do you mean that you are going to divest yourselves, or refrain from serving them?

The WITNESS: Refrain from serving them.

Exam. HIGGINS: There may be some points, terminal points, you will serve and some intermediate points you may serve although you divest yourself of the right to serve those terminal points—

Mr. BOE: I did not understand him to say that.

Exam. HIGGINS: I am sure he did not mean that, but that he refrained in accordance with the so-called Barker doctrine.

Mr. SHIELDS: That is what he had in mind.

Exam. HIGGINS: Excuse me for interrupting, Mr. Shields.

Mr. SHIELDS: That is quite all right.

Q. (By Mr. SHIELDS) Did you have any negotiations with respect at any time to divesting yourselves of those rights either by sale or lease?

A. No, we did not.

Q. What if you are not able to dispose of them satisfactorily?

Mr. BOE: I have stated for the record that we would comply with any directions of the Commission in that connection.

Mr. SHIELDS: I will withdraw that question. That is all.

## Re-direct Examination.

Q. (By Mr. BOE) The contract that is before the  
130 Commission for consideration does not refer to any rights of the White Line Motor Freight Company or White Line Trucking Company, in territory east of Chicago, such as in Indiana, Ohio and Michigan, does it?

A. No, it does not.

Q. And it is confined and is intended to be confined to the rights of the White Line Motor Freight Company and White Trucking Company between Chicago and Omaha, extending through the Tri-Cities and Des Moines and the segment to Muscatine, Iowa, and Cedar Rapids, Iowa?

A. Yes.

MR. BOE: That is all, Mr. Peterson.

Exam. HIGGINS: Wait a moment, Mr. Peterson.

Are there any persons here who arrived after the commencement of the proceedings who now desire to file appearances? George E. Wiard, Merchants Motor Freight, is that the proper name?

MR. WIARD: Merchants Motor Freight, Incorporated.

Exam. HIGGINS: May I ask the gentleman if he is appearing for the individual doing business as—

MR. WIARD: Appearing for the corporation.

Exam. HIGGINS: You are appearing for the corporation?

MR. WIARD: Yes.

Exam. HIGGINS: Mr. Wiard, do you intend to take an active part in the proceedings?

131 MR. WIARD: As our interests may be found to appear.

Exam. HIGGINS: Have you prepared a written petition of intervention?

MR. WIARD: Yes, I have.

Exam. HIGGINS: Will you please file it and serve copies on other counsel?

MR. WIARD: Yes, sir, I will do that.

Exam. HIGGINS: Have you been admitted to practice before the Interstate Commerce Commission?

MR. WIARD: Yes.

Exam. HIGGINS: Mr. E. R. Brillhart. For whom do you appear, Mr. Brillhart?

MR. BRILLHART: For the Atlantic Motor Freight.

Exam. HIGGINS: A corporation?

MR. BRILLHART: No, a partnership.

Exam. HIGGINS: Atlantic Motor Freight?

MR. BRILLHART: Yes.

Exam. HIGGINS: Did you fill out an appearance blank, Mr. Brillhart?

Mr. BRILLHART: No, I am going to fill it out.

Exam. HIGGINS: Mr. Brillhart, are you going to take an active part in these proceedings today?

Mr. BRILLHART: No, sir.

Exam. HIGGINS: You are appearing as an interested party and as a partner?

132 Mr. BRILLHART: Yes.

Exam. HIGGINS: Have you been admitted to practice before the Commission?

Mr. BRILLHART: No, sir.

Exam. HIGGINS: In what capacity do you appear?

Mr. BRILLHART: I am a partner.

Exam. HIGGINS: And you are appearing in an official capacity as a partner?

Mr. BRILLHART: Yes, sir.

Exam. HIGGINS: Any further appearances?

Mr. SHIELDS: I would like at this time to enter a further appearance on behalf of the Brady Transfer & Storage Company, and the Des Moines Transportation Company, their attorney being Rex Fowler of Des Moines, Iowa, who has forwarded a petition to intervene in their behalf, but Mr. Fowler is not present, and there is no one in a representative capacity other than myself appearing as their attorney, but Mr. Fowler is admitted to practice before the Interstate Commerce Commission.

Exam. HIGGINS: The intervening petitions of the Des Moines Transportation Company and Brady Transfer & Storage Company will also be received. Inasmuch as Mr. Brillhart is appearing as an interested party and he is not going to take an active part in the case, I do not think it is necessary for him to file a written petition. How-  
133 ever, if he should examine or cross examine witnesses, I will have to insist that he file a written petition of intervention.

Mr. BOE: I will agree to that statement, Mr. Examiner.

Mr. SHIELDS: There was a little re-direct on which I would like one or two questions on re-cross.

Exam. HIGGINS: Do that now, and I will take up my questioning after you finish.

Mr. SHIELDS: All right.

#### Re-cross Examination.

Q. (By Mr. SHIELDS) Mr. Peterson, referring to your answers to your attorney's questions concerning opera-

tions from Chicago to the Tri-Cities, how much of that operation parallels the Rock Island railroad?

A. The operation between the Tri-Cities and Chicago does not parallel the Rock Island railroad.

Q. Can you give us any idea of the number of miles that does not parallel the Rock Island railroad?

A. Yes, it is approximately in the neighborhood of 200 miles between Chicago and the Tri-Cities, and those 200 miles are perhaps 20 to 25 miles away from the Rock Island railroad, at their farthest point.

Q. And those operations are involved in what is known as the grandfather application of the White Lines?

A. Yes.

Q. To what extent does this entire transaction depend on motor carrier operations from the Tri-Cities into Chicago?

A. I did not quite understand that question.

Q. Suppose it should develop in the Commission's order on the White Lines' grandfather application, that they had no grandfather rights from Chicago to the Tri-Cities—

Mr. BOE: I am going to object to any questioning concerning the grandfather rights of either the White Line Motor Freight Company or White Line Trucking Company, under any applications now on file with the Interstate Commerce Commission. Any issue concerning the extent and nature of those rights is involved in those applications which have not yet been passed upon by the Interstate Commerce Commission, and should be properly developed in those proceedings.

Exam. HIGGINS: I agree with your position insofar as it relates to getting into the merits of the respective grandfather applications, but if it relates to the possible effect upon the general operation by the applicant, assuming the applications are approved, which might result from a denial of any present right, I will permit him to answer, if that is what Mr. Shields has in mind.

Mr. SHIELDS: I have no intention whatever of injecting the issues of any grandfather applications at this time.

Mr. BOE: This question should be of a general nature and not specific as to any particular points or territory, and in that event I will waive the objection; but if he  
135 proposes to refer to this particular route I will renew the objection, because that is peculiarly confined to the applications now pending with respect to grandfather operations, interim rights or any other rights claimed under applications by the White Line Companies.

Exam. HIGGINS: I think it is obvious if the rights which you propose to buy are restricted in any manner by a denial of any part of the respective grandfather applications of the White Line companies, that certainly the proposal would be affected to that extent, at least.

Mr. BOE: Well, I say, if the question is general I haven't any objection, but if counsel wishes to interrogate this witness particularly as to portions of the route involved, then I do not think that it is relevant to this inquiry.

Mr. SHIELDS: Your Honor, this is in response to the re-direct, and the re-direct had to do with the Chicago to Tri-Cities operations and this little segment of the route I am including.

Exam. HIGGINS: Now, let us get back to the question. Read the question, Mr. Reporter.

(The question was read.)

Exam. HIGGINS: Is it not self-evident if they had any rights the applicant could not make any use of them or could not acquire them?

Mr. SHIELDS: My inquiry was to what extent they  
136 affect the transaction involved here. I might say particularly as to the consideration involved I think it is fair to assume that these applicants have not taken into consideration any negotiations leading up to the execution of this contract. It might be possible that it will be determined that the White Line companies have no grandfather rights over any of these routes.

Mr. BOE: That is conceivable, but I do not want to indulge in all sorts of supposititious cases, but it seems to me if we continue the inquiry we are opening up, there is no end to it.

Exam. HIGGINS: You do not know to what extent the consideration of any other factors would be affected if any portion of these rights should be denied?

The WITNESS: Mr. Examiner, we are acquiring whatever rights they may have, which is specifically set out in the contracts.

Exam. HIGGINS: That is the best answer you can give?

The WITNESS: Yes.

Q. (By Mr. SHIELDS) Then, Mr. Peterson, may I ask you this question: I appreciate the fact you have no specific plan of coordination, but do you feel that motor carrier operations from Chicago to the Tri-Cities not paralleling the railroad in a territory of some 180 to 200 miles is not practically any coordination between the rail and motor lines?

A. I am not quite prepared to answer that question.

Mr. SHIELDS: That is all.

137 Exam. HIGGINS: Any further examination?

Mr. BOE: No further examination.

Exam. HIGGINS: Mr. Peterson, as far as you know, do the lines in black shown on Exhibit B-7-(f), attached to the application, correctly represent all lines of the railroad, The Chicago, Rock Island & Pacific Railway Company?

The WITNESS: The heavy black line does, yes.

Q. (By Exam. HIGGINS) Did I understand you to say that the railroad conducts operations by motor vehicle as a railroad between St. Joseph and Kansas City through an arrangement with some trucking company mentioned by you?

A. Yes, that operation was started in 1934.

Q. Is that the only motor operation now conducted by the railroad?

A. That is the only one conducted by the railroad in the transportation of commodities.

Q. But the railroad has some pending applications?

A. They do have.

Q. For extension of routes?

A. They have.

Q. And that is operation by motor vehicle?

A. Yes.

Q. Are they for motor vehicle operation?

A. Yes, we have before the Interstate Commerce Commission, I believe, five applications at the present time.

138 Q. Are they mentioned in your direct testimony?

A. Yes, they are mentioned in my direct testimony.

Q. Does the applicant operate by motor vehicle at the present time, that is, the Transit Company?

A. It does not.

Q. So up to now at least it is a non-carrier corporation?

A. Yes, it is.

Q. And it will become a carrier if this application is approved?

A. If this particular application is approved, yes.

Q. Do you happen to know the names of any of the larger stockholders of the Rock Island railroad?

A. No, I do not, not offhanded.

Q. Can you identify Harrigan & Company for me? They are shown to own 24.65 per cent of the total outstanding common stock of the railroad.

A. I am not familiar with the ownership of the Rock island railroad.

Q. You are not?

A. No, sir.

Exam. HIGGINS: Can you answer that question, Mr. Boe?

Mr. BOE: The identity of that stockholder?

Exam. HIGGINS: Yes.

Do you know whether Harrigan Company is a nominee for the Irving Trust Company?

139 Mr. BOE: I don't know that.

Exam. HIGGINS: Will you ascertain that fact and furnish it to the Commission?

Mr. BOE: I will be glad to submit that information to the Commission.

Q. (By Exam. HIGGINS) Harrigan & Company of New York. Are you familiar with the routes of the White Line Motor Freight Company?

A. Yes.

Q. Where do they operate generally?

A. The White Line Motor Freight Company operates on Highway No. 6—

Q. Can you give me the terminal points? It is a little difficult for me to follow these highways. Can you give me the terminal points?

A. On the West to Atlantic, Des Moines. Newton, Tri-Cities in Iowa, Davenport in Iowa, then from Moline via Highway 34, I believe, into Chicago.

Q. Is there any operation shown in green on the map which is designated—

A. Yes.

Q. Exhibit B-7-(f) attached to the application?

A. Yes, sir, there are two segments, or one down to Muscatine and one up to Cedar Rapids, and a small segment to Oxford, so short that it is hardly noticeable,  
140 on the map, off of Highway 6.

Q. Generally speaking, except for those deviations they operate between Omaha and Chicago?

A. Yes.

Q. Do they possess any other operations?

A. Not to my knowledge.

Q. What is the route mileage between Omaha and Chicago?

A. Approximately 500 miles.

Q. 500 miles?

A. Approximately, yes.

Q. What are the operating rights of the White Line Trucking Company, and their routes? They do not seem to be shown on the map, which is furnished, Mr. Boe, unless they are parallel to some extent—

Mr. BOE: I think Mr. Peterson can give you that in answer to your question.

The WITNESS: The White Line Trucking Company at the present time have an application before the Interstate Commerce Commission to do business in six or eight states adjacent to the State of Iowa. They do not have their grandfather rights established as yet, so far as I know. However, we intend to do no contract business. We intend merely to operate as a common carrier in interstate commerce, and will abide by the Commission's order as to what if anything to do with those rights. We do not intend to use them as a contract company.

141 Q. (By Exam. HIGGINS) Which common carrier rights do you propose to purchase from that company?

A. Just the common carrier rights shown in green, Omaha to Chicago.

Q. That involves the operating rights of the White Line Motor Freight Company. I would like to know what you are going to acquire by way of regular common carrier operations from the White Line Trucking Company which can be used in some question of emergency with the railroad, and I am not able to determine the routes from this map.

Mr. BOE: I might say at this point that the White Line Trucking Company have rights to destinations involved in this transaction, and similar to those outlined in green on the map attached to the application, and rather inaccurately referred to as the White Line Motor Freight routes. That designation should be both White Line Motor Freight Company and White Line Trucking Company, is not that true, Mr. Peterson?

The WITNESS: Yes.

Exam. HIGGINS: You mean that the White Line Motor Freight Company and White Line Trucking Company have buses and operate over the same highways in a paralleling operation between Omaha and Chicago?

Mr. BOE: That is my understanding, and insofar as this transaction is involved, it is confined to the routes shown in green on this map.

142 Exam. HIGGINS: Under those circumstances, if you are given authority to acquire the rights only be-

tween Omaha and Chicago would there be any necessity for the rights on the other operation?

Mr. BOE: I don't think so, insofar as they are identical as to points served and routes served. They will both be conducted—that is, the service of the White Line Motor Freight Company and White Line Trucking Company will be of a common carrier nature, will be confined to the routes and such operating rights as a common carrier that the White Trucking Company has, as distinguished from the White Motor Freight Company, will be confined to the routes shown in green on this map.

Now, my understanding is that they both operate over this same route—

The WITNESS: Between Omaha and Chicago.

Mr. BOE: Between Omaha and Chicago. Now, the Trucking Company, as testified, has filed applications with respect to irregular routes without any specific description as to highways in six or eight other states. Those operations are not proposed to be acquired, as I stated before.

Exam. HIGGINS: What is going to happen to them?

Mr. BOE: Well, if they are required to be operated, we will make arrangements to divest ourselves of such operating rights, or abandon them. I do not think, and I

143 am sure in so stating, that there is any intention to broaden out the operation beyond that shown in green on this map. Such operations as are to other points, both of the Motor Freight Company and the Trucking Company, will be disposed of.

Now, as I understand further, and I think Mr. Stone is prepared to verify the statement, he has consummated a deal with a Mr. Bell with respect to operations between Chicago and Eastern points, particularly in Indiana and Michigan.

Exam. HIGGINS: Are you speaking now of the—

Mr. BOE: Of the Motor Freight Company.

Exam. HIGGINS: The Motor Freight Company?

Mr. BOE: Yes. With respect to the Trucking Company operating rights, we will make the effort to dispose of those contract carrier rights that are beyond the routes shown in this map. As I understand, no common carrier rights are claimed to any of these irregular points that are not shown on this map and which appears in green.

Exam. HIGGINS: I think there must be some little conflict in the testimony from that statement. I understood Mr. Peterson to say that the full extent of operating rights

of the White Line Motor Freight Company were between Chicago and Omaha. That is not quite correct, is it?

Mr. BOE: I think he had reference to this transaction. I might ask him on re-direct whether he had in mind the White Line Motor Freight rights in Indiana and Michigan. They are not involved in this transaction.

144 Do you have any information with respect to the proposed disposition of those rights?

Exam. HIGGINS: That would be east of Chicago?

Mr. BOE: East of Chicago operating rights.

The WITNESS: I understand a hearing has been held before the Interstate Commerce Commission, an Examiner of the Commission, to dispose of all the rights that the White Line Motor Freight Company has to that operation, which is east of Chicago.

Exam. HIGGINS: All right, that takes care of the White Line Motor Freight Company, does it not?

Mr. BOE: Yes.

Exam. HIGGINS: Very well. With respect now to the White Line Trucking Company, you propose to retain such rights as they might have under their grandfather application, between Omaha and Chicago, which also parallels the rights and routes of the White Line Motor Freight Company between the same points; and you propose to abandon or to relinquish any contract operating rights which they might have, as well as irregular operations in the five or six states mentioned, is that right?

Mr. BOE: Right.

Exam. HIGGINS: Is that correct, Mr. Peterson?

The WITNESS: Yes.

Q. (By Exam. HIGGINS) Now, what was it you said about the operation between Chicago and the Tri-Cities?

145 Did I understand you to say that the routes of the White Motor Freight Line between Chicago and the Tri-Cities did not parallel the lines of the Rock Island railroad between the same points?

A. The Rock Island railroad over this highway practically parallels the Rock Island railroad all the way from Chicago to the Tri-Cities—

Mr. BOE: I don't think you have answered the Examiner's question, or did you answer it?

The WITNESS: No, I didn't answer. Well, the White Line companies have what is known as a somewhat shorter route from the Tri-Cities, which parallels 92 and 34, as I recall practically all the way from the Tri-Cities to Chicago.

Mr. BOE: And those highways are parallel with the Rock Island?

The WITNESS: No, they are not parallel with the Rock Island between those two points.

Mr. BOE: Might I amend that; they are not parallel to the Rock Island.

Exam. HIGGINS: Well, they appear to be parallel in a general sense so far as the map in the application shows.

Mr. BOE: But I was ambiguous.

Q. (By Exam. HIGGINS) Do you know the respective difference in distance between the rail and highway between Chicago and the Tri-Cities?

A. As far as I recall it, it is approximately 30 146 miles farther—the highway, and the Rock Island Railroad is 39 to 40 miles farther than the highway, that is 39 to 40 miles farther than the one paralleling the Rock Island.

Q. Well, I want the railway and route mileage. I want to find out whether this is a short cut.

A. The rail mileage from Chicago to Rock Island is 181 miles.

Q. By the Rock Island line?

A. Via the Rock Island line.

Q. Now, what is the highway mileage over 92 and 34?

A. 185 is my recollection.

Mr. BOE: I have an official state highway map of Illinois that might show exactly.

Exam. HIGGINS: Instead of the highway being the shorter route it is four miles longer?

The WITNESS: Yes.

Q. (By Exam. HIGGINS) You propose to serve or to operate, if you are given authority to acquire these lines, between Chicago and the Tri-Cities by motor vehicle, but you do not propose to serve any intermediate points which are on the lines of other railroads?

Mr. BOE: That is right.

The WITNESS: That is correct.

Q. (By Exam. HIGGINS) And it appears from the map, since the line of railroad is some distance from the highway route between Chicago and the Tri-Cities, that nearly 147 all the points served would be off the line of railroad?

Mr. BOE: That is right.

The WITNESS: Yes.

Exam. HIGGINS: But the railroad does serve the Tri-Cities as well as Chicago?

The WITNESS: Yes.

Mr. BOE: That is right.

Exam. HIGGINS: And you do not propose to relinquish your right to serve at the terminal cities?

The WITNESS: No.

Exam. HIGGINS: Does that correctly describe the situation?

Mr. BOE: I believe it does, your Honor. I think we have stated in two or three different ways in this examination, and in my statement for the record, that it is not the purpose of the applicant or the trustees of the Chicago, Rock Island & Pacific Railway Company, insofar as they may be indirectly involved, to abandon any of the interstate operations of the White Line Motor Freight Company or White Line Trucking Company as a common carrier between Chicago and East Moline, Moline, Rock Island in Illinois, and Davenport in Iowa.

There is not to be conducted any intermediate business or any business to points that are intermediate to those points I have named. Chicago on the east and East Moline on the west. No attempt will be made to serve any  
148 intermediate local points from those two terminals.

Exam. HIGGINS: You do feel that all the rest of the corporation will be used in conjunction with whatever proposed coordinated service you intend, in serving all the points on the railroad?

Mr. BOE: Yes, sir.

Exam. HIGGINS: That is, west of the points you mentioned?

Mr. BOE: Yes, sir.

The WITNESS: This map here shows a very detailed statement of the two highways. Would you like to have it?

Exam. HIGGINS: I do not want to get so many maps.

The WITNESS: This is Highway 34 here.

Exam. HIGGINS: This map attached to the application is marked up, and I think that is sufficient.

Now, did your company undertake to pay this purchase money without having some definite idea of what it can do by way of coordinated railway-truck service? Just how do you propose to tie up the operations of the motor lines to promote the public interest and the public advantage by using motor vehicles in the operation, of the railroad?

The WITNESS: There are several instances in connection with the railroad where, if we acquire this operation, if we are allowed to rightly coordinate the service, that we can give earlier and better service to our patrons along  
149 the line of the Rock Island railroad, particularly

in Iowa where we acquire a certain amount of intra-state rights in connection with this operation. Where we can save hours and make earlier deliveries.

Exam. HIGGINS: Just how will you do that?

The WITNESS: We have a witness here, Mr. Davidson, who is qualified to give that information.

Mr. BOE: He is another witness.

Exam. HIGGINS: Do you propose to introduce that co-ordinated method to merchandise cars so as to enable you to make over-night delivery?

Mr. BOE: That is one point.

Exam. HIGGINS: Do you have a witness who will describe that later?

Mr. BOE: Yes, I think we have a witness who will describe examples of coordination that is possible.

I think I might make this observation. As Mr. Peterson has said, I think we have in mind the possible improving of rail service by permitting earlier deliveries through the merchandise service, and we have in mind not restricting it to that, the purpose being to afford a more prompt and better service than we are able to afford at present, and if experience proves that the highway service will be superior to any coordinated service, then it is proposed to conduct an all-highway service between the points, and I  
150 think Mr. Davidson will be able to amplify what I am saying.

The WITNESS: As I understand it, some of the other witnesses who will follow are better qualified to make that statement than I am.

Exam. HIGGINS: Would Mr. Peterson be the proper witness with respect to the physical property which is to be acquired?

Mr. BOE: I think so. He is more familiar than anybody else as to the physical property.

Q. (By Exam. HIGGINS) How much physical property will pass to the applicant in this proceeding, if the White Line Motor Freight Company and White Line Trucking Company are acquired?

A. Approximately 120 pieces of equipment, in the nature of rolling stock, tractors and trailers and all the office fixtures listed under the contract, which is Exhibit B under the contract.

Q. Is this physical property all detailed in the application?

A. Yes.

Mr. BOE: Exhibit B contains the schedule that is attached to the contract?

The WITNESS: Yes, Exhibit B contains all of the rolling stock, the tractors, trucks and trailers, and Exhibit B also includes an inventory of all of the equipment in the offices in the various buildings.

Mr. BOE: The schedule to which the witness is referring is attached as an exhibit to the contract which is  
151 attached to the application.

Q. (By Exam. HIGGINS) As I recall it, the ledger value of this particular physical property is approximately \$103,000?

A. As I understand it, that is the ledger value. The depreciated value carried on the books of the White Line company.

Q. That is the depreciated ledger value?

A. As I understand it, yes, sir.

Q. And you understand that that means original cost less accrued depreciation to date?

A. Yes.

Q. Did you make any appraisal of the property personally?

A. Yes, I have personally examined every piece of equipment herein listed.

Q. Listed in the schedule?

A. Yes.

Q. What in your opinion is the present value of all of that property?

A. I would say the present cash value would be somewhere in the neighborhood of \$50,000, the cash value.

Q. What is the basis for that opinion?

A. Well, the basis for that opinion is—

Q. Replacement cost?

A. Replacement cost, if you wish to go out and buy or sell this particular equipment.

Q. So for an expenditure of \$50,000 for operating  
152 rights and property, and the assumption of \$9,400—

Mr. BOE: Of installments.

Exam. HIGGINS: Of installments, \$9,400, your company will be getting physical property which in your opinion is valued at approximately \$50,000?

The WITNESS: In that neighborhood, yes.

Q. (By Exam. HIGGINS) That would leave at least a very small amount allocable to the operating rights?

Mr. BOE: I think that is true.

Exam. HIGGINS: And then you consider as the indebtedness is paid off that increases the value of the equipment that much more?

Mr. BOE: I think that is a fair assumption, your Honor.

Exam. HIGGINS: Have you been able to make a study of the facilities possessed by the Rock Island railroad company with respect to depots, terminals, pick-up and delivery, and whatever else they may be, between Chicago and Omaha, as compared to the facilities of the two White companies?

The WITNESS: To a certain extent I have, yes, sir, particularly in the larger cities. I have not at all the intermediate smaller places.

Q. (By Exam. HIGGINS) Would you say the Rock Island railroad is better equipped from the standpoint of facilities?

A. Yes, decidedly so.

Q. In what respect?

153 A. We have stations in the towns along the Rock Island railroad and in practically all of them we have available space where we can handle this merchandise handled by the White Line Motor Freight Company, and we have the facilities right there to take care of them, where they do not at the present time have any stations.

Q. They have no stations between Chicago and Omaha?

A. That is, at these smaller points. They do have stations at the Tri-Cities, Des Moines, and the larger cities.

Mr. BOE: Places like Chicago, Council Bluffs, and such as that?

The WITNESS: Yes.

Exam. HIGGINS: And they have terminals, depots and agents?

The WITNESS: Yes.

Q. (By Exam. HIGGINS) Pick-up and delivery service?

A. Yes.

Q. Do you propose to make all of these services available for this proposed service, if the application is approved?

A. Yes.

Q. Will their facilities be operated by or in connection with this service?

A. That is my understanding, yes, sir.

Q. Did I understand that the Rock Island Transit Company once conducted motor carrier operations which  
154 were temporarily suspended on October 19, 1932?

A. Yes.

Q. What were those, intrastate operations?

A. Yes, it was an intrastate operation from Blue Island into Chicago, and the intermediate points or stations between Blue Island and the city of Chicago.

Q. Did the White companies also possess intrastate rights between Chicago and Omaha?

Mr. BOE: They have no certificate from the Illinois Commerce Commission.

Exam. HIGGINS: You propose to conduct both interstate and intrastate operations with this service?

The WITNESS: Yes, sir.

Q. (By Exam. HIGGINS) And that will require separate applications to each of the Commissions?

Mr. BOE: Insofar as the Iowa laws are applicable; I might say they possess an interstate certificate insofar as Iowa is concerned. I will be happy to supply that, if you think the record should show it, but they possess no certificate from the Illinois Commerce Commission under the Illinois law with respect to intrastate certificate.

Exam. HIGGINS: You expect to engage in both intrastate and interstate commerce between Chicago and Omaha?

Mr. BOE: That is true.

Exam. HIGGINS: With respect to the rail coordination?

155 Mr. BOE: That is true.

Mr. SHIELDS: May I have that clarified a little? Do you intend to conduct intrastate operations in Illinois?

Mr. BOE: Insofar as any intrastate operations may be lawfully conducted at the present time, they will be continued. I cannot at this time say that there will be no intrastate operations in Illinois, but I can say that there will be no attempt to conduct any intrastate operations between East Moline and Chicago on the highway now operated by the White Line Motor Freight Company to the same extent and in the same manner as applied to interstate transportation, and that no attempt will be made to conduct any local operations intrastate between Chicago on the east and East Moline on the west.

Q. (By Exam. HIGGINS) Do you know the present rail service of the Rock Island railroad between Chicago and Omaha and intermediate points, especially with respect to L. C. L. business?

A. Why, we have a witness here, Mr. Davidson, who is well qualified to give those facts.

Q. Now, you said something about effecting operating economies without restricting the service. Just what did you have in mind?

A. Well, in most of these cities and towns where the White Line now has their own terminals, we can use our own terminal facilities and thereby make some operating econ-

omy in the operation, saving some money in the operation.

156 Q. You mean the terminals would be closed?

Mr. BOE: They might be consolidated with ours.

The WITNESS: With our terminals, yes.

Exam. HIGGINS: Anything else?

Q. (By Mr. BOE) What is there in the way of shop facilities leasing their premises or anything of that sort that bears on the point the Examiner is referring to?

A. It is particularly possible that we may have railroad facilities also that we can use in connection with the White Line operation, and generally we intend to use the railroad facilities wherever they are available, where they can be used to advantage in connection with the White Line Motor Freight Company.

Q. Just in connection with shop facilities, does the Rock Island railroad maintain any extensive shop facilities in this territory? Are you able to refer to any specific points?

A. We have a very large shop at Silvis.

Q. Silvis, Illinois?

A. Silvis, Illinois.

Exam. HIGGINS: I would like to clear up, before we get to another subject, the matter of this duplicate operation of the White Line Motor Freight Company and White Line Trucking Company.

Do those companies, as separate corporations, conduct freight line operations between Chicago and Omaha, do both of them run their own vehicles over that route?

157 Mr. BOE: That is what I understand.

Exam. HIGGINS: Over the same highways?

Mr. BOE: That is what I understand.

Exam. HIGGINS: Engaged in the same common carrier service throughout the operation?

Mr. BOE: We do not intend to keep the Trucking Company's business as a contract carrier as distinguished from a common carrier's service, but it may be determined in the production of further evidence, that some of the operations conducted by the White Line Trucking Company will be held to be common carrier operations. For that reason, insofar as the operations of the White Line Trucking Company may be of a common carrier service, it is our intention to acquire such rights and merge them with the White Line Motor Freight Company rights, between Chicago and Omaha on the routes that are identified in the map attached to the application.

**Exam. HIGGINS:** There would not be any particular point in getting leave to duplicate routes over the same highway, if one operation will serve the purpose?

**Mr. BOE:** That is true.

**Exam. HIGGINS:** And that is what you had in mind after the grandfather applications are decided?

**Mr. BOE:** Yes, as I said before, and as appears from the contract here, the corporations themselves will be dissolved, and such operating rights of a common carrier nature  
158 as both possess, it is contemplated will be transferred to the applicant in this proceeding, under this arrangement. Is that correct?

**The WITNESS:** Yes, sir.

**Q. (By Exam. HIGGINS)** Do you expect to rehabilitate the equipment acquired, or is it in such shape that it can be put into immediate use?

**A.** This equipment is now being used, a big volume of it, at the present time is in service, and it is our intention to use this equipment as long as it is serviceable and in good shape. If it is not new, we intend to acquire new equipment.

**Q.** Have you any definite plans, I mean?

**A.** No, there are no definite plans as to disposing of this equipment and buying new equipment.

**Mr. BOE:** In connection with the equipment, may I ask a question at this point?

**Q. (By Mr. BOE)** Is it your belief, Mr. Peterson, that there would be a surplus of equipment should the Commission approve this transaction, that may be appropriated by the railroad company to service other points on other routes than operations now involved in Illinois and Iowa?

**A.** Yes, I believe we will have some extra equipment which we can use at other points on the railroad.

**Exam. HIGGINS:** Does the applicant have other applications pending for acquisition of rights?

159 **The WITNESS:** Yes, the Rock Island—

**Q. (By Exam. HIGGINS)** Now, I don't mean the Rock Island railroad, but the Rock Island Motor Transit Company.

**Mr. BOE:** Yes.

**Exam. HIGGINS:** Did you give a description of those in your direct testimony? I thought what you gave me were pending applications of the railroad.

**Mr. BOE:** That is right.

**The WITNESS:** This is a pending application of the railroad.

Exam. HIGGINS: But I am talking about pending applications of the Rock Island Motor Transit.

Mr. BOE: No, there are no other applications, except that I might refer to one that will be filed with the Interstate Commerce Commission today—

Exam. HIGGINS: Well, I am not particularly concerned with that, but what is pending today?

Mr. BOE: I might say another application will be filed by the Rock Island with the Interstate Commerce Commission, or this applicant.

Exam. HIGGINS: In your direct testimony you state that: "There would be innumerable instances, in my judgment, where it would be practical to offer a service, either wholly by motor carrier or partly by rail and partly by motor carrier, superior to that now in effect via Rock Island  
160 or the service of the White Line companies in the territory here involved."

What do you mean by the "wholly by motor carrier"?

The WITNESS: Taking points west of Des Moines at the present time, using wholly motor carrier service, the service reaches Des Moines in the morning and it is delivered to those points some time in the day, and in the western part later in the afternoon, whereas if we had this operation and could use it in conjunction with our own freight houses this movement can be started out at night and the freight can be dropped at these intermediate points during the night and be available for our customers in the morning when they open up their business.

Q. (By Exam. HIGGINS) Which service did you have in mind when you made your comparison, the motor service or rail service?

A. That is the motor service there, in conjunction with the rail service.

Q. In conjunction with the rail service?

A. Yes.

Q. And when do you expect that you will unload and deliver that freight?

A. In the morning about six o'clock or eight o'clock in the morning.

Q. And where does that truck go, that is, the peddling truck?

A. That goes from Des Moines to Omaha.

Q. And you propose to perform that service throughout the night?

A. Yes.

161 Q. So that the freight will be available for them the following morning?

A. Yes.

Q. And at all stations as well as at intermediate points?

A. Yes, sir.

Mr. BOE: Yes, that is true.

Q. (By Exam. HIGGINS) That would be the inauguration of an over-night service, would it?

A. Practically speaking, yes, there would be a night service there that would give the merchants a better service on the merchandise than they now get.

Q. Is that going to move exclusively by truck without any rail movement whatever?

A. The L. C. L. shipments out of Des Moines would move exclusively by truck, and it is possible the shipments coming in from the east by rail—there is a possibility that they might move by this same truck. It would be coordinated, however, from that angle.

Q. Any concentrated freight from Des Moines would move west by truck, is that correct, without any rail movement up to that point?

A. The L. C. L. merchandise locally from Des Moines would move by truck.

Q. Yes, without any rail movement?

A. Yes, sir.

162 Q. And the rail merchandise coming from the east to Des Moines would also be distributed by truck from Des Moines?

A. It is very possible that that will be worked out.

Q. So there will be a dual operation, truck operation, without respect to any rail movement, and a rail-truck operation, is that correct?

A. Yes.

Q. And I presume you would move the L. C. L. business on rail billing, and on your rail rates on the direct truck operation?

A. Yes.

Mr. BOE: I think Mr. Davidson can give you all that.

Exam. HIGGINS: If I am asking questions that you propose to cover by another witness, I will be very glad to desist.

Mr. BOE: No, I think that is all right to have Mr. Peterson testify, but I think Mr. Davidson will give you that fully.

Exam. HIGGINS: Well, I will desist, if it is competing.

Mr. BOE: I do not think it is competing with the railroad, in the sense that it is a different type, because it is not comparable services that are offered where the existing rail service has demonstrated weaknesses. We feel that by utilizing the motor carrier service daily between some points on the railroad we might be permitted to offer a superior service to that now offered daily by rail.

Q. (By Exam. HIGGINS) And what time do the  
163 freight houses close, generally seven o'clock?

A. I would say about six o'clock.

Q. Supposing freight came into Des Moines after the regular freight office closing hour, what would happen to it, would it be kept there over night and have to wait for the next schedule?

A. If it could be moved by truck?

Q. I was going to get to that, that is the next question, what would happen to a movement all-rail, would it be kept in the freight house until the following morning, or until the time of the next schedule?

A. Yes, as a rail movement, it would be.

Q. And under those circumstances the stations at intermediate points would not receive that freight until some time the next day?

A. That is right.

✓ Q. Now, do you propose to move shipments of that character out by truck?

A. If we can give more expedited service by moving them by trucks we intend to do that.

Q. Well, can't you expect it by using that operation?

A. We can, yes, sir.

Q. There is not much doubt about that, is there?

A. Well, if we can move this freight quicker by truck, it is our intention to move by truck. If it can be moved quicker by carrier, rail carrier, we intend to move it by

164 rail. A complete coordinated service is what we intend to work out.

Exam. HIGGINS: And Mr. Davidson will cover that in more detail?

Mr. BOE: He will, and he will give specific examples.

Exam. HIGGINS: All right. Now, I understand that the White Line Transfer & Storage Company is not a common carrier by motor vehicle, so that while Mr. Stone's acquisition of control thereof is indirectly involved, it does not necessitate the filing of an application by Mr. Stone to acquire control, because it is not a common carrier by motor vehicle—

Mr. BOE: That is true.

Exam. HIGGINS: Engaged in interstate commerce?

Mr. BOE: That is right.

Exam. HIGGINS: Is that clear to you, Mr. Shields?

Mr. SHIELDS: That is as I understand it, as far as the operation is concerned.

Exam. HIGGINS: Yes.

Mr. SHIELDS: I have some questions about it.

Exam. HIGGINS: Has the stock all been deposited with the escrow agent?

Mr. BOE: Yes.

The WITNESS: Yes, sir.

Exam. HIGGINS: Has the money also been deposited?

Mr. BOE: Yes, and specific reference has been given in the direct testimony to those facts.

165 Exam. HIGGINS: I think that is all I have, Mr. Peterson.

Mr. BOE: That is all of Mr. Peterson.

Exam. HIGGINS: Any further questions?

Q. (By Mr. SHIELDS) I would like to put some questions at this point before the witness is excused, but I do not know whether this would be the proper witness or not.

We have heard quite a bit here about the White Line companies' operations, some of them are on the Rock Island railroad and some of them are not, and the only graphic representation we have on the map is those operations which are on the railroad, that they intend to take over.

Now, they also state they are going to take over all of the common carrier operations of the two White Lines. I would like to establish some distinction as to those operations which they do not intend to take over, and what would happen in that event.

Exam. HIGGINS: I intended to cover that.

The WITNESS: We will cover that.

Exam. HIGGINS: I understand they now have pending an application to sell to other parties the routes of the White Line Motor Freight Company, Incorporated?

Mr. BOE: That is right.

Exam. HIGGINS: East of Chicago to Michigan and Indiana points, and they will only retain, if given authority in this proceeding, the routes of the same company  
166 between Chicago and Omaha. Is that correct?

Mr. BOE: That is correct.

Exam. HIGGINS: Now, that is correct, what I said about the operating rights of the corporation?

Mr. BOE: That is correct.

Exam. HIGGINS: And to the extent that the White Line Trucking Company does possess or receives authority from the Interstate Commerce Commission to conduct any contract operations, those will be relinquished or abandoned, is that correct?

Mr. BOE: That is right.

Exam. HIGGINS: The applicant if given authority proposes to retain the common carrier rights and operations of the Trucking Company between Chicago and Omaha?

Mr. BOE: That is correct.

Exam. HIGGINS: Where they parallel the routes of the White Line Motor Freight Company?

Mr. BOE: That is correct.

Exam. HIGGINS: And the applicant also agrees to relinquish or abandon any irregular route operations of the White Line Trucking Company?

Mr. BOE: That is right.

Exam. HIGGINS: Which may be certified?

Mr. BOE: That is right.

Exam. HIGGINS: Now, is that clear, Mr. Shields?

167 Mr. SHIELDS: Are there any operations between Chicago and Omaha that are not graphically set out on this map of the White Line Company?

The WITNESS: No.

Exam. HIGGINS: I certainly did not understand so, and I would like to know about it if there are any.

Mr. BOE: No, there are none.

It is affirmatively of record that there are none aside from those shown on this map attached to the application.

Exam. HIGGINS: Very well. Is there anything further of this witness?

(No response.)

Exam. HIGGINS: You are excused.

(Witness excused.)

Mr. BOE: If your Honor please, I wonder if I may be allowed to put a witness on out of order? Mr. C. E. Hochstedler, a witness from the Chicago Association of Commerce has some very pressing engagements, and I wonder if I might put him on now a little out of order.

Exam. HIGGINS: That may be done.

C. E. HOCHSTEDLER was sworn and testified as follows:

Exam. HIGGINS: I would like the record to show at this point that applicant made oral representation to me to the effect that Mr. Hochstedler's testimony was important to the presentation of his case and thereupon requested 168 that I issue a subpoena requiring Mr. Hochstedler to appear. I issued such subpoena, he accepted service, and I understand he is here in pursuance of that subpoena. Is that a correct statement?

The WITNESS: That is correct, Mr. Examiner, and I would like the record to clearly show that I am appearing in response to a subpoena. That any answers I may make to any questions propounded either on direct or cross examination, or any statements I may make in support of those answers, represent my personal views, and do not in any respect indicate that they are the views of the Chicago Association of Commerce, the organization with which I am officially connected.

Exam. HIGGINS: That will be understood.

Mr. BOE: That is so understood.

#### Direct Examination.

Q. (By Mr. BOE) Will you give your name and address to the reporter.

A. My name is C. E. Hochstedler; my business address is 1 North LaSalle Street, Chicago, Illinois.

Q. What is your business or profession, Mr. Hochstedler?

A. I am traffic director of the Chicago Association of Commerce.

Q. And how long have you been traffic director of the Chicago Association of Commerce?

A. Since October 1, 1928, with the exception of a period from July 10th, 1933, until June 7th, 1936, during 169 which period I was on a leave of absence, serving as assistant traffic assistant to the Federal Coordinator of Transportation.

Q. As traffic director of the Chicago Association of Commerce, briefly what have been your duties?

A. My duties in my official capacity extend to all transportation matters in which the shippers of Chicago and Chicago as a community have an interest.

When I refer to transportation matters I refer to all transportation, freight, passenger, and every form of transportation agency.

Q. You have reference to both railroads and motor carrier transportation in this statement, do you not, Mr. Hochstedler?

A. Yes, sir, and also waterway and air transportation.

Q. This application, Mr. Hochstedler, is an application by the Rock Island Motor Transit Company to acquire certain equipment and operating rights of the White Line Motor Freight Company and the White Line Trucking Company, and I show you a map that has been identified as Exhibit B-7-(f), attached to the application, filed in this case, which map purports to show the lines of railway of The Chicago, Rock Island & Pacific Railway Company, and the routes of the White Line Companies which the Rock Island Motor Transit Company proposes to acquire. The Rock Island Motor Transit Company is a wholly owned subsidiary of The Chicago, Rock Island & Pacific Railway Company.

170 Are you familiar in a general way with the transportation of property by motor carrier and railroad, in the territory between Chicago, Illinois, and Omaha, Nebraska, that extends through the Tri-Cities and Des Moines, Iowa?

A. I think I am fairly familiar with it.

Q. In the conduct of your duties, do you have occasion to consider the transportation service of one type or another to and from that territory?

A. I live with it.

Q. And when you say you live with it, Mr. Hochstedler, then what further did you have in mind in making that statement?

A. One of the outstanding functions of the transportation department of the Chicago Association of Commerce, of which I am in charge, is to keep in constant contact with the transportation service available from and to Chicago via all transportation agencies, and to elaborate upon that a little bit I think it may not be improper, Mr. Examiner, to state that for a considerably over thirty years the Chicago Association of Commerce has undertaken, through co-operation of the transportation agencies, first, the railroads alone, later the other transportation agencies, the function of keeping the shippers advised of the transportation service available, particularly the transportation service in connection with the so-called merchandise or less car-load traffic.

We publish in our department a Shipping Guide of something like 700 or 800 loose leaf pages showing the  
 171 service available for the handling of less carload traffic, originally only by rail. Through the co-operation of the railroads we were able to establish through merchandise cars to the larger industrial centers, and to break bulk points, and the handling of freight in those cars, plus the local service beyond, as reflected in our Guide, we feel is the best, the most expeditious service available.

Exam. HIGGINS: Have you actually seen that in operation as a practical matter, in moving cars to certain cities or break bulk points and making distribution on both sides?

The WITNESS: Yes, we invite criticism or complaint of any instance where the service that we advertise, and which is worked out, first in cooperation with the railroads, and then in connection with our working time tables which we check up every month, to see that their freight trains are scheduled so as to make the stated time which we advertise, fails to do so. We have been engaged in that work for over thirty years. We think that this activity of ours has been very beneficial to our shippers. We think it has been very beneficial to the railroads. It has resulted in the concentration of these less carload shipments and less carload traffic in through cars, avoiding the intermediate transfers with consequent expense and the hazard of the opportunity for loss and damage. We think we have been of help, both to the shippers and to the railroads.

Exam. HIGGINS: Is that a substitute for peddler  
 172 car service?

The WITNESS: Well, it is not a substitute for peddler car service; it is an attempt to work out the best possible means of minimizing the peddler car service, if you please. In other words, take a shipment destined to a station beyond Des Moines, Iowa, and we provide in this Guide that that shipment will be loaded in the Des Moines car which will make second morning delivery from Chicago.

Des Moines will make second morning delivery but to a station immediately beyond Des Moines, such as Booneville, as indicated on the map, and which I understand is identified as Exhibit B-7-(f), it would be third morning delivery due to the fact that the car would be placed at the house at Des Moines, would be worked on the second day, and would leave Des Moines on the way freight train the morning of the third day, although to Omaha, Nebraska, to which point there is sufficient tonnage to justify a through car, we

would get second morning delivery the same as at Des Moines.

Now, this entire publication, Mr. Examiner, is devoted to an effort upon our part to work out with the railroads primarily, and I say primarily because they were the only ones that handled this character of freight at the time the publication was initiated, the best possible service.

Now, there are dozens and dozens of different routes to handle traffic to Booneville or to Des Moines, maybe  
 173 routes via St. Louis, and there are many other junctions involving intermediate transfers, and goodness knows only when the freight would get there and so the sole purpose of this Guide originally was to concentrate this less than carload traffic into through cars, either to destination, or as far in the event there was not sufficient tonnage to load a car to destination, to a break-bulk point, which, in connection with the way freight service beyond, would give us the most expeditious service, and would at the same time insure the heavier loading of the merchandise cars and eliminate the opportunity for loss and damage through the intermediate transfer, and on the whole haul would show to both the shippers' and the rail carriers' advantage.

Now, that is a situation which has prevailed for over thirty years, up until the time that the motor carriers entered the picture. Since that time, of course, so far as rail service was concerned we have continued to secure that cooperation with the railroads, although we have a new situation confronting us with respect to the motor carriers and we have enlarged upon the Shipping Guide in an effort to give the motor carrier the same representation that we give the railroads, to the extent that we find this motor carrier operation is responsible.

We now publish a motor truck guide in the section in which we show states, alphabetically arranged, and  
 174 points alphabetically arranged, and show the service direct from Chicago, indicating whether it is a direct service or involves a transfer to a connecting carrier intermediate. We do not undertake to show the time in transit for reasons which I think you may well appreciate: The motor carrier industry has not yet reached that stage of ability so that they know themselves, although there are many carriers that we consider entirely reliable, and we know that they are giving good service, and we are trying to encourage that degree of reliability and responsibility which the shipping public must have, and they want to look at it that way.

Q. (By Mr. BOE) Now, Mr. Hochstedler, may I direct your attention specifically to Section 213 of the Federal Motor Carrier Act, particularly those clauses which are to the effect that an acquisition such as is proposed by this application may not be authorized unless it be shown that such acquisition will promote the public interest by enabling a railroad to use service by motor vehicle to public advantage in its operation. I want to ask you whether or not you have any opinion as to whether the acquisition, such as is proposed here, would be inconsistent with clause of Section 213 of the Motor Carrier Act which I have referred to? Have you an opinion?

A. I think I should say in response to that question, that I have an entirely open mind on that subject. I am sorry that I have not had an opportunity to give more  
175 study to this situation. I want to be absolutely fair to the Rock Island railroad and I want to be absolutely fair to the responsible motor carriers, but above everything else I am interested in the utilization of the various transportation agencies, rail, truck, water and air, within their proper economic spheres.

A few years ago I had hoped that before this time we would have a considerable degree of coordination between rail and highway agencies. Now, I mentioned a moment ago, Mr. Examiner, that Booneville, Iowa, with third morning delivery by rail from Chicago, due to the necessity of transferring the freight from a through car at Des Moines to a peddler car, which will make your delivery the next day—

Exam. HIGGINS: Can you state at this point how far Booneville is from Chicago by rail mileage, approximately?

The WITNESS: I believe I have that, I hope I have. 372 miles, and to Des Moines it is 358 miles, or Booneville would be 14 miles beyond Des Moines.

Q. (By Exam. HIGGINS) And one is second morning delivery, and the other is third morning delivery?

A. That is right, but to Omaha, if the Examiner please, which is 503 miles by the Rock Island railroad, we also have second morning delivery due to the fact that we have enough freight to send out a through car.

Now, what I have had in mind for a number of years, and I gave it a great deal of study while I was with the  
176 Federal Coordinator, is coordination of the rail and truck service. In the absence of, definitely thought

out figures and based solely upon my observation and experience. I am inclined to feel that providing there is sufficient tonnage, the handling of less carload freight by rail from Chicago to Des Moines is probably more economical than handling it over the highway, but when it comes to handling freight from Chicago to Booneville, if you please, I am equally confident that the more economical method of handling would be by rail from Chicago to Des Moines and by truck from Des Moines to Booneville.

That car must arrive—well, I haven't the exact schedule here, but it must arrive at Des Moines the night of the second day, because we make Omaha, many miles beyond, also, on the second morning, so that that freight could be loaded in a truck and started out from Des Moines the same morning and make second morning delivery at Booneville.

Exam. HIGGINS: How much was that distance, 14 miles?

The WITNESS: 14 miles.

Mr. BOE: Yes, 14 miles.

Exam. HIGGINS: Well, just summarizing what you have said generally, I understand from your observation and experience you feel that rail-truck coordination, especially with respect to L.C.L. merchandise freight accomplishes about three things; it expedites delivery; it attempts to give the merchants at intermediate points approximately  
177 the same service as given line stations, and I think you used Booneville as an example as to the difference in time there was between intermediate points and line stations.

Mr. BOE: Yes.

Exam. HIGGINS: It is perhaps more economical, depending upon the circumstances?

The WITNESS: That is right, Mr. Examiner.

Exam. HIGGINS: Does that summarize your statements?

The WITNESS: That is right.

Now, there is this further view, and I want it understood in making this statement, that I am not undertaking to condemn anyone, but it is a fact that the motor carriers as a rule give excellent service between the most important industrial centers. They pass through the intermediate points without giving any service at all. Now, we are just as much interested—and when I say “we”, I am speaking of the shippers of Chicago—we are just as much interested in giving service to these intermediate points like Booneville, if you please, as we are to the larger points such as Des Moines and Omaha. Now, it is immaterial to us, it is imma-

terial to me as an individual, whether this coordinated service is by railroad in connection with a subsidiary truck line, or whether it is by railroad in connection with an independent truck line, but the independent truck lines from my observation, are inclined to stay away from serving the small communities. The railroads are re-

178 quired to serve them, and our Association—while

I am not speaking for the Association here,—our Association while it has taken no position whatever on the question as to the propriety or impropriety of railroad ownership, operation or control of motor carriers, it has taken a very definite position on my recommendation, that if and when the Commission, pursuant to Section 213 of the Act, authorizes such acquisition and control, then the motor carrier should not only be permitted but it should be required to serve all of these communities, that is, the communities served by these railroads.

Mr. Boe: That would be the character of service that you would declare a railroad was permitted to perform?

A. I shall make mention of that, Mr. Boe. I appeared in MC-F-4, the Alko case. We have not, I do not think, in this case a situation similar to what I had in mind there, but we have been very much disturbed by the decisions of the Commission in which they authorized railroads to take over motor carriers and then say that the services of these motor carriers must be confined to services accessorial or supplemental to the rail service, and certain of the Commissioners have construed those decisions to indicate that this motor carrier service must be confined to traffic which has had a previous, or will have a subsequent rail movement, and I illustrated that in Docket MC-F-4, by the Chicago-Cincinnati Motor Freight Lines, the acquisition of which

179 by the Pennsylvania Truck Lines, Incorporated, a wholly owned subsidiary of the Pennsylvania Railroad, had been authorized, and which line operates between Chicago and Cincinnati through Logansport, Indiana, and according to the construction which has been placed upon that decision, the truck line would be permitted to handle freight between Chicago and Logansport, Indiana, a distance of 117 miles, provided that freight originated beyond Chicago or was destined beyond Logansport, Indiana, or vice versa, but any freight originating at Chicago and destined to Logansport or LaFayette, or LaFayette and Logansport to Chicago could not be handled by that motor carrier. Now, on the face of it it just seems to

me that the opportunity for economies of operation is prohibited by such a construction.

As I understand it, from this map and the information I have been able to get and also from the information we have had from the White Lines, the White Line does not undertake to handle the traffic at points between Chicago and Silvis, Illinois,—is that right, Mr. Boe?

Mr. BOE: Intermediate points, yes, that is true, Mr. Hochstedler.

The WITNESS: And we have excellent service both by motor carrier and by rail from those points to the Tri-Cities, but the same principle is involved. Take a shipment from Moline, if you please, to say Iowa City, a comparatively short distance; there might not be enough less 180 carload freight to justify a daily car from Moline to Iowa City, but why, in the name of goodness, if the Rock Island is authorized to operate over the White Line, should not that be permitted to be handled by truck and thereby give the shippers at Moline and Iowa City the service to which, in my opinion, they are justly entitled?

I think that is one of the most important phases connected with this question of railroad ownership and operation, and I am not taking any position as to whether or not it is on the whole in the public interest for the railroads to acquire ownership and control of motor carriers. I think each case is determined on its own merits, and what we are interested in is that nature of service which is so clearly possible of accomplishment under proper coordination of the two agencies of transportation.

Q. (By Mr. BOE) So that it would be your conclusion, from what you have said, that if an acquisition such as is proposed here was approved, it would promote the public interest by enabling the parent railroad company to establish service by motor vehicle to public advantage, is that true, Mr. Hochstedler?

A. I think that the coordination, which I understand you propose, would be in the public interest. I think that the Interstate Commerce Commission, under other sections of the Act, has ample authority to prevent the Rock Island or its subsidiary motor carriers, in the event that 181 you should undertake any practices that were not in the public interest,—to prevent them.

Now, I am neither advocating nor opposing this acquisition. I am advocating to the extent of my ability the coordination of these transportation agencies. I think it is

a matter with which we must necessarily experiment to a certain extent to find the best solution. As far as I am personally concerned, it does not make one bit of difference to me whether the White Line is an independent operation or whether it is an operation of the Rock Island railroad, if we can coordinate these services.

Q. And you feel that such an acquisition as is proposed would lend itself to the development of an improved service both via highway and via railroad, is that true?

A. I do, and I might elaborate a little further on that, Mr. Examiner.

When I was informed a couple of days ago, that I was going to be subpoenaed in this case, I got in touch with Mr. E. M. Durham, chief executive officer of the Rock Island railroad, whom I know very well, and in whom I have every confidence, and I told him that I wanted him to tell me very frankly whether the Rock Island was attempting to take over this truck line with a view to affecting economies and improving the service, or whether they were taking it over with a view to putting motor carriers out of busi-

182 ness, and he assured me that the sole purpose of the Rock Island was to effect economies and improve the service, and I think Mr. Durham's record, to my personal knowledge, is such that I am willing to take his word for that one hundred per cent at this time, and certainly if it is granted I am sure that our organization—my department—will watch it, and if anything we think is improper should be undertaken, we will probably be the first to appear before the Commission in connection with it.

Q. I want also to ask you, Mr. Hochstedler, insofar as another clause of Section 213 is concerned, whether in your opinion the proposed acquisition will unduly restrain competition in this territory?

A. I have undertaken within the brief period I have had since I was notified of this case, to determine just what that situation is, and I find here as in other cases, that we have very extensive motor carrier operations between Chicago and the principal industrial centers, Moline, Rock Island and Davenport; in addition to the White Line we have direct service by the Burlington Transportation Company, the Chicago Motor Express Terminal, the Interstate, Keeshin, Peoria and Pioneer. When we get to Walcott, Iowa, about 14 miles beyond Rock Island, we have no motor service at all except for the White Lines.

Exam. Higgins: That is west of Walcott?

Mr. BOE: No, at Walcott, he said.

The WITNESS: At Walcott, allowing 196 miles 183 from Chicago by rail, Rock Island is 182 miles, a difference of 14 miles, and the only service we have out there now is the White Lines; so it might be conceded that for the Rock Island to take over the White Lines would eliminate the competition between the rail and the highway at Walcott, Iowa. As far as I am concerned, I am willing to assume the responsibility for the elimination of that competition.

Q. Do you think the public interest at Walcott, would suffer from that operation?

A. I certainly do not, and even when you get down to Wilton, which is shown as Wilton Junction on this map, the only direct service we have there via the highway is the White Line, although the Interstate Trucking Company handles traffic to that point in connection with some connecting carrier, but we go over a long line there where there is practically no motor carrier service except the White Line.

Exam. HIGGINS: Are you moving west of Wilton now?

The WITNESS: Yes, from Wilton the next station is Moscow, 211 miles from Chicago, and the only motor carrier service we have there today is the White Line. And, the same thing is true at Atalissa, 216 miles, and then we get to Iowa City, which is a community of some importance, with over 15,000 inhabitants, and again we have a lot of competition. In addition to the White Line we have the Chicago Motor Express Terminals, Keeshin and Reliable, serving points direct, and then we have the 184 Interstate and I take it they service it by transfer, and then we go along until we get down to Malcom, 293 miles from Chicago, and we haven't any direct service from or to Chicago for the distance from 266 miles to 293 miles we haven't any direct motor carrier service from Chicago of which we are aware. That is, there may be some contract carrier service or some service of some small carriers, but there is no service by any motor carrier a member of the Chicago Association of Commerce.

Q. But your members are common carriers by motor vehicle rather than contract carriers?

A. Oh, yes. My study is based upon the motor carriers that are shown in the Motor Truck Section of our Shipping Guide.

Then when we get to such points as Newton, Iowa, we have this highway competition again, so my conclusion is,

and I hope I am right, that there will be maintained in the event the Commission should grant this proposal, a very substantial degree of competition at these more important points where the common motor carriers see fit to operate and that at the intermediate local points the service will be improved. That is my offhand conclusion, based upon the brief study I have been able to make.

Q. In that connection, Mr. Hochstedler, have you any observation to make with respect to other railroad competition in this general territory?

A. Well, of course, the map speaks for itself in 185 that respect. We have competition at all of these points, rail points. We have daily merchandise cars to Des Moines, Iowa, by possibly five different routes and at other points, such as Tri-Cities.

Q. To the big points, such as Tri-Cities, Des Moines, Cedar Rapids, Council Bluffs, and Omaha?

A. We have more than one daily merchandise car to each of those points you have stated.

Q. By some other railroad than The Chicago, Rock Island & Pacific Railway Company?

A. Yes, sir. And I might say, Mr. Examiner, that this service is reliable and we know just what this service is, it is direct without any delay, and we know just what time these cars will make it to Cedar Rapids, Iowa, and we have a daily car out of Chicago for Cedar Rapids by The Chicago, Rock Island & Pacific Railway Company, one by the Chicago, Milwaukee, St. Paul & Pacific, and one by the Chicago & North Western, and one by the Illinois Central; and we have similar service to the Tri-Cities, to Des Moines, Iowa, and the more important points, via several different routes. Of course, these cars also contain freight destined to local points beyond on those individual routes. The Rock Island car will contain freight to points from Rock Island to points in that vicinity that will be peddled to this particular territory, and the North Western cars will contain freight which will be peddled to points on their railroad in that immediate territory. The object has 186 been to work out these schedules so as to minimize the time in transit, and make the business as profitable as possible to the transportation agencies.

Q. Have you any comment to make with respect to the practice of according C.O.D. privileges via highway motor carrier, whether that would fit into any possible scheme under this proposed acquisition? Whether you feel that that privilege could be promoted and enlarged and be built

up further than it is at the present time, with Rock Island control or management?

A. Well, one of the greatest headaches I have in the office is trying to assist our shippers in collecting the C.O.D.'s. Now, I want it clear that there are some motor carriers that are absolutely exempt from that situation, but that there are others that seem to be disposed to utilize the proceeds of C.O.D. collections as operating capital. I do not like to mention any names, but at the same time it is a real problem today.

There are certain motor carriers serving Chicago and I see some of them represented here this morning, and there has never been a complaint of that kind against them, and I want to make it clear that with them that is not the situation, but nevertheless that is one of the great problems with which we are confronted today. I do hope betterments may result from the Commission's notice that the motor carriers, if they are going to perform this  
187 service, must conform with its order and provide a time within which they will make delivery, but unfortunately many of the carriers seem to know nothing about that, and are not disturbed about the Commission.

However, these are the problems confronting us and confronting the shippers, and the motor carriers, that must be worked out in time. Of course, I think that the shippers as a rule are probably more confident of a motor carrier that has the financial backing of a railroad than they would be in the case of some of these motor carriers whose financial standing is in question. On the other hand, I want to make it clear that there are motor carriers in the field whose operations in that connection are just as perfect as are the operations of the railroads.

Q. Would you say, Mr. Hochstedler, that the aspect of promoting satisfactory investigation and adjustments of freight claims might have a connection with such an acquisition as this, based upon the experience the railroads have developed over their years of operation of a railroad?

A. I think in general terms my answer to that would be the same as I answered the questions you asked with respect to the C.O.D.'s. There are many motor carriers that have very little financial backing; many of them do not have adequate insurance, and when I speak of adequate insurance, I am not referring to the minimum requirements established by the Commission, because before a motor carrier can obtain membership in our As-

188      sociation he must have insurance coverage ranging from double to twelve and a half times the insurance requirements of the Commission, and I think that that requirement on our part has operated to keep certain of the companies in business, because after they took out this additional insurance they were involved in accidents which would have bankrupted them had they not had this additional insurance, but, as I say, I feel my answer to that would be the same as I gave with respect to the C.O.D.'s. We are all anxious to have the claims settled as promptly as possible, and those common carriers that are dilatory in remitting C.O.D.'s are usually also dilatory in settling claims. And on the other hand, those motor carriers that are prompt in remitting the C.O.D.'s are usually prompt, and some are more prompt than the railroads in settling claims.

Q. Did you say in response to an earlier question how much your membership is in the Chicago Association of Commerce, Mr. Hochstedler?

A. In the neighborhood of 4,500, I believe.

Q. Now, from what territory does your association draw its membership?

A. Well, from the Chicago metropolitan area.

Q. Is part of that membership composed of receivers and forwarders of freight to and from this territory that is involved in this proposed acquisition, Mr. Hochstedler?

A. The vast majority are shippers and receivers  
189      of freight. I would say 3500 of the 4500 are actual receivers and shippers. I think I am perhaps a little conservative on that, because we also have in our membership transportation agencies; we have the railroads and the trucks and the waterways and the airplanes, and then we have professional men, attorneys, accountants, and so forth, but my offhand guess is that at least 3500 of the 4500 are actual receivers and shippers of freight.

Mr. BOE: Thank you, Mr. Hochstedler, that is all on direct examination.

Exam. HIGGINS: Cross examine.

#### Cross Examination.

Q. (By Mr. SHIELDS) I have but one question. The general discussion that you have had here, Mr. Hochstedler, would apply to any railroad, would it not?

A. With certain exceptions.

Q. I am speaking generally.

A. No, there are certain railroads who, if they attempted to acquire motor carriers I would be disposed to oppose

such acquisition, because I would know they were going in for the sole purpose of removing that motor carrier competition, and that I would not support, and I would not take the neutral stand as I have endeavored to do here.

I have lived with this situation all of my life. I know from my own contacts how some of these various people feel, railroad executives, trucking company executives, and all that I am interested in is securing the best possible transportation, the most economical transportation, and I do not mean by that that I expect these agencies to cut each other's throats, or anything of that kind, but what we are looking for is the most efficient and economical transportation that can be supplied through the coordination of these various transportation agencies. If I know of any one who I think is trying to cut the other fellow's throat and hasn't in mind the improvement of the service and effecting economies in handling it thereafter, I would not say one word in favor of him.

Q. Through your testimony you were using the term "we". You did not mean by that in any sense that the Association had indicated its position in this matter?

A. No, I thought I made that clear at the outset, and I think I did make it clear, but I want to say this now, that while the Association of Commerce has taken no position on railroad operation or ownership of motor carriers, it has taken the position at my suggestion, that when the Commission having power only under Section 213 of the Motor Carrier Act, authorizes such acquisition and operation, then such motor carrier should not only be directed, but it should be required to give the public the service to which it is justly entitled.

Q. Along that line you spoke of service between the Tri-Cities and intermediate points, I believe, between Chicago and Omaha?

191 A. Yes.

Q. You mentioned certain intermediates that were served, you thought, only by the White Line?

A. As far as our records go. If I made a positive statement I did not intend to do so.

Q. You mentioned specifically Walcott; do you know whether or not the White Lines serve that point?

A. They do.

Q. Do you know whether they hold authority to serve that point?

A. I don't know anything about that, although I assume they do, or they would not have operated to it. They not

only serve it for regular freight, but they operate refrigeration service.

Q. Speaking of coordination generally, if there are other motor carriers than the one the railroad might acquire, such as you have in this case, is it possible that perfect coordination service could be worked out with these other motor carriers?

A. I don't know why it should be impossible. I think I have expressed regret that there has not been more accomplished in the direction of coordinating these services. Also, that it was immaterial to me whether it would come by a railroad in connection with subsidiaries or by a railroad in connection with an independent trucking line.

192 What we are interested in is the service.

Exam. HIGGINS: May I just ask a question at that point, so I will not forget it?

Mr. SHIELDS: Certainly.

Q. (By Exam. HIGGINS) Do you find as a general rule that it is a whole lot easier to coordinate service you control than it is to attempt to coordinate two independent organizations? While it might be true that the Rock Island could coordinate with independent truckers other than those they seek to acquire, is it not a natural thing to expect that you can coordinate services better if you can control all facilities under a single controlling head?

A. I think that is in keeping with human nature, Mr. Examiner. I have talked with a number of people on this general subject, and I find a reluctance—whether justified or not, I would not undertake to say—but I have found a reluctance on the part of railroads to coordinate their services with the motor carriers, because they say if they coordinate with one they will have to treat them all alike, and as to some of them they are very doubtful as to their responsibility, and for the time being at least they prefer not to work with them, and, as I say, I am not expressing an opinion as to whether that position is justified or not. We still have a big problem ahead of us with respect to the

193 highway transportation, and I would like to see the public interest promoted to the greatest possible extent in the coordination of these transportation agencies, and it is immaterial to me how that is accomplished, the Commission having sufficient jurisdiction, in my opinion, to prevent any abuses, any unjust discrimination or undue preference or prejudice, either as between shippers or as between carriers. What we are interested in is to get the service.

Q. (By Mr. SHIELDS) Mr. Hochstedler, you indicate you did not think it was impossible to work out a coordinated service. Do you know of any examples where that is actually being done?

A. No, I do not.

Q. Are you acquainted with the use of flat cars, which the Keeshin Lines use between here and the Twin Cities?

A. That was not the character of coordinated service I had in mind. As a matter of fact, I think that is a commendable practice, but it is not the coordination that I have in mind.

The Chicago Great Western Railroad has these operations not only with Keeshin but with other truck lines between Chicago and the Twin Cities. We have rail service for merchandise freight between Chicago and the Twin Cities. Keeshin and the others, of course, serve certain territory beyond. Now, that is a form of coordination, but that is not what I have in mind; and there is the same situation between Chicago and Peoria. You see, the Rock

194 Island initiated that practice, and from the best information I can get, and I have access to fairly authentic data on the subject, the Rock Island is making money by conducting those operations between Chicago and Peoria, and I think the trucks are saving money and I certainly have no objection to an extension of that arrangement. As a matter of fact, I had intended to advocate it in the general motor carrier investigation.

Q. Isn't that the base of all efforts of coordination, to save costs and to save money?

A. Certainly.

Q. Why could that not be worked out on other phases of coordination as well as the phase we are discussing at this hearing, without having control?

A. It is possible it could, and it is immaterial to me how it is done.

Mr. SHIELDS: That is all.

Mr. BOE: That is all, Mr. Hochstedler.

Q. (By Exam. HIGGINS) I have just a few questions I wish to ask. —

In addition to expediting the service and attempting to give the intermediate stations the same service which is given to main line points by coordinating the rail-truck deliveries, does not this proposal contemplate also the increased lading of merchandise cars for set out points?

A. That is a very important feature, Mr. Examiner. I

195 had not intended to stray too far beyond the scope of this proceeding.

Q. Well, it has merits, anyway. If you increase the lading in certain merchandise cars, if you increase the lading of a certain number of merchandise cars, you will save that much in the loading of other cars?

A. Unquestionably.

Q. Do you know how much that amounts to from the time that car is emptied of its load, and is ready for its other lading?

A. No.

Q. How much time elapses, what is the per diem charge and the switching charge?

A. No.

Mr. BOE: I wonder if Mr. Davidson cannot tell you about that.

Exam. HIGGINS: I think this is an important point.

The WITNESS: The Federal Coordinator made a very comprehensive study of all those matters, Mr. Examiner, but I have not the figures in my head, and I do not know that I would want to support their recommendations one hundred per cent, or anything of that kind, but I do think that the data which were assembled and promulgated, principally if not wholly from railroad sources, is absolutely authentic, and I do recall that that study indicated that these cars were in terminal service for a far longer period than they were in line haul service.

196 Now, one of the greatest difficulties we have met with in our attempt to confine the loading of the less carload traffic to these through cars has been due to competition. We have, as I have mentioned, four daily cars from Chicago to Cedar Rapids. I doubt if there is enough tonnage to justify four daily cars. There may have been prior to the entrance of the trucks in the field; in fact, some of them probably had more than one car daily—

Exam. HIGGINS: If you increased the loading and moved them to set out points and trucked them for certain distances from the set out points, you would at least, if you increased the loading to only two cars, tend to at least save the loading of two cars a day, wouldn't you?

A. Unquestionably.

Q. (By Exam. HIGGINS) Together with whatever the cost is of loading two local cars?

A. That is right.

Exam. HIGGINS: Somebody ought to have some idea about that, I should think.

Mr. SHIELDS: I wonder if this involves coordinated service by rail and motor?\*

Mr. BOE: Yes, to a certain extent it is coordinated rail and truck service.

Exam. HIGGINS: Yes, that is what I had in mind.

Q. (By Exam. HIGGINS) Did you form any opinion with respect to the logical set-up of break-bulk points between Chicago and Omaha with respect to this particular proceeding?

197 A. No, Mr. Examiner, I have not had an opportunity to give this particular proceeding the thought that it really merits. In fact, I do not think I have devoted thirty minutes to it in the aggregate, because I have been so tied up with another meeting, but we do load cars today by the Rock Island and I have no doubt the Rock Island would show that—I know we load cars to the Tri-Cities, to Cedar Rapids, to Des Moines and I think to Newton, Iowa—I would not be positive about that—and to Omaha, and wherever there is sufficient tonnage to justify the movement of a through car, that car is loaded, and we do not ask these railroads to load a through car unless there is sufficient tonnage to justify it. We are just as much interested in their welfare as we are in our own service. We are dependent upon them, and to a large extent our success is dependent upon their success, but I say that through cars are now operated, many of them probably with light tonnage, possibly with less tonnage than would really justify the movement, so if this coordination could be made effective for the public interest, I think it undoubtedly ought to be more profitable to the transportation agencies and more beneficial to the shippers and receivers of Chicago and these other communities involved.

I do not think it would involve installing any through cars. They may have to use more than one car on a  
198 certain day if the tonnage is sufficient, but that is a situation we have right along. There is no regularity in tonnage. One day you may have 5,000 pounds and the next day 25,000 pounds.

Q. Have you any opinion on the distances the trucks should operate on either side of the set up point, 50 miles or 75 miles, for instance?

A. Mr. Examiner, I think that is a practical question that will have to be worked out in a practical way. There may be instances where 50 miles would be the limit, and there may be other instances—undoubtedly not in this case, but I can conceive of instances where 200 miles might be a

reasonable limit. It depends upon the volume of the tonnage and the location of the terminals, and so forth.

Now, in checking this map, and just offhand, they are loading daily cars to the Tri-Cities, to Cedar Rapids and Des Moines, and I think there is a through car to Grinnell, Iowa, but I won't say positively—I don't want to take time to look it up, but I can give it to you if you want it—but it might be a practical operation that cars should be loaded to Des Moines and the Tri-Cities and then the truck would work westward from Des Moines and westward from the Tri-Cities, deliver freight and pick up freight. That is, deliver freight received from those cars and pick up freight that is destined to points beyond its terminals.

On the other hand, from a practical point of view  
199 it might be desirable to make those points between the Tri-Cities and Iowa City, on the one hand, or between Iowa City and Des Moines, Iowa. It depends upon the volume of the tonnage and the truck transportation. I would not want to undertake to say how either the Rock Island or any other transportation agency should handle its business. It should handle it in the most economical manner possible with efficiency, but the efficiency naturally depends upon the practical aspects in each instance.

Q. Now, just referring for a moment to the Chicago Association of Commerce, that is a voluntary association?

A. The Chicago Association of Commerce is an organization composed of individuals, firms and corporations, organized under the laws of the State of Illinois, for the purpose of promoting the interests of the Chicago district, the members of the Association and trade, commerce and public welfare. Its services are both civic and commercial.

Exam. HIGGINS: Anything further?

Mr. BOE: Nothing further, Mr. Examiner.

Exam. HIGGINS: You are excused.

(Witness excused.)

Exam. HIGGINS: We will recess until a quarter to two.

(At 12:45 o'clock P. M. adjourned until 1:45 o'clock P. M.)

#### AFTERNOON SESSION 1:45 P. M.

200 Exam. HIGGINS: Are there any persons here who desire to file an appearance at this time who have not heretofore filed any appearance?

(No response.)

Exam. HIGGINS: Call your next witness, Mr. Boe.

WALTER M. WHARTON was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) State your name and residence, Mr. Wharton?

A. Walter M. Wharton; Omaha, Nebraska.

Q. What is your business or occupation, Mr. Wharton?

A. Manager of the transportation bureau of the Omaha Chamber of Commerce. I have been with the Omaha Chamber of Commerce since 1918; manager of the bureau since 1934.

Q. And tell us generally what are your duties as manager of the Transportation Bureau of the Chamber of Commerce of Omaha.

A. To look after the transportation interests of Omaha and our members.

Q. You are a licensed practitioner before the Interstate Commerce Commission?

A. Yes, sir.

Q. From what source does the Chamber of Commerce of Omaha draw its membership?

A. From all sources. From shippers, professional men, railroads, truck lines, air planes, that is, various air plane lines.

Q. And with respect to territory, is it true or not true that the membership is drawn from those having places of business or engaging in business in and about Omaha, Nebraska?

A. In and about Omaha, within a radius of about twenty miles.

Q. What is the membership approximately of the Omaha Chamber of Commerce?

A. About 2,000.

Q. And what is the purpose generally of the Omaha Chamber of Commerce?

A. The Omaha Chamber of Commerce is a non-profit Nebraska Corporation, organized for the purpose of promoting the commercial, industrial and public interest and welfare of the city of Omaha. Our membership includes all of the principal shippers and receivers of freight at Omaha. Also, a number of them at Council Bluffs, Iowa.

Q. In the performance of your duties as manager of the Transportation Bureau of the Omaha Chamber of Commerce, do you have occasion to acquaint yourself with the agencies of transportation that serve Omaha and the territory east of Omaha, say as far as Chicago, extending

through Des Moines, Iowa, the Tri-Cities, and into Cedar Rapids, Iowa, and a point like Muscatine, Iowa?

A. I do.

Q. Is that with respect to both motor carrier transportation and rail transportation?

A. Yes, sir.

202 Q. Have you seen a copy of the map that is attached to the application in this case, identified as Exhibit B-A(f), Mr. Wharton?

A. Yes, sir.

Q. In this proceeding, the Rock Island Motor Transit Company, a wholly owned corporation of The Chicago, Rock Island & Pacific Railway Company, seeks to obtain the right to acquire certain operating rights and equipment of White Line Motor Freight Company and White Line Trucking Company, which are, insofar as the routes of these motor companies are concerned, generally located between Chicago on the East and Omaha on the West, and extending through the Tri-Cities, Des Moines, with segments to Cedar Rapids, Iowa, and to Muscatine, Iowa, and then from Des Moines, on to Omaha.

Now, I want to direct your attention to Section 213 of the Motor Carrier Act, particularly the clauses thereof which relate to acquisition by a railroad or a carrier controlled by a railroad, of other motor carriers, and I want to ask you whether or not you have an opinion as to whether or not the transaction proposed will promote the public interest by enabling the applicant or its parent company to use service by motor vehicle to public advantage in their operation? Have you an opinion on that?

A. I have.

Q. What is that opinion?

203 A. Well, we are very much interested in all forms of transportation, and particularly interested in anything that will serve to improve our transportation facilities and service, and we believe that the granting of this application will enable the applicant to better serve their patrons in that territory.

Q. Have you any specific methods of improvement that might be adopted by the inauguration of transportation service by the Rock Island Motor Transit Company or indirectly by The Chicago Rock Island & Pacific Railway Company, should the Commission look with favor upon this application?

A. I have suggestions or ideas as to what could be done, yes, sir.

Q. Will you amplify your answer, then, in that respect?

A. Well, we are all living in an age of speed, and anything which will enable the transportation of goods from the shipper to the consignee at a greater speed than that which it is now handled at is of much concern to all of us.

I think that by the acquisition of this truck line, the Rock Island railroad would be enabled to greatly speed up their traffic, particularly to the smaller towns. They could do that, for example, by loading a solid car from Omaha to Chicago, and where that car would be stopped in transit some twenty to twenty-five times today, under their present

204 railroad service, it could be stopped about four or five times, unload the traffic for the intermediate points at the larger stopping points, and from there distribute it by truck to the intermediate points. In that way where it would take possibly three days now, to make delivery to destination, it could be handled in one day. In other words, they would speed up their service anywhere from 24 to 36 hours.

Q. Would the fact of control of the motor carrier service by the railway company for transportation between the shorter distant points that are closer together be of any advantage, in your judgment?

A. It would have a great deal of advantage over a co-ordinated service with a carrier that was not owned and controlled by the railroad.

Q. For example, if a shipment was destined from Omaha to one of the smaller points intermediate to Omaha, and Des Moines, would the operation entirely by truck in substitution of rail service, local freight train service, be, in your opinion, an added advantage to the shipper by affording an improvement in service?

A. Yes, sir, it would be an added advantage to the service the Rock Island railroad is able to give those patrons today.

Q. In other words, do you think that the schedules could be shortened?

A. Very much so.

Q. And that earlier deliveries might be accomplished at the destinations, in the morning, for instance?

A. Yes.

Q. And it might be possible to have later departures at night on outbound business?

A. Yes, sir.

Q. Would the fact that the Rock Island Railway now has stations and agents under its ownership and control at substantially all points between Chicago and Omaha on this route, so that it would be possible to utilize those facilities in any motor carrier operation, be of public advantage, do you believe?

A. Very much of a public advantage, and it would be something which could not be done in coordinating the service with the truck line which was not owned and controlled by the railroad.

Q. What would you say with respect to the probability of greater use of the C. O. D. privilege if a motor carrier service was under the control, directly or indirectly, of the Rock Island railroad?

A. Well, we have a number of truck lines today which are very reliable. They make their C. O. D. returns promptly, just as promptly as any railroad, but they are very much in the minority. The great bulk of the truck lines are very very slow in making their C. O. D. returns, and that is one of the things the shippers are greatly concerned about today. During the past two weeks we have had four

206 or five meetings with the truck lines. The truck lines at Omaha are endeavoring to work out a new set of rules and regulations and in so doing we got them to cooperate with the shippers. We have had about twenty-five shippers at these meetings with the truckers, and they all expressed the opinion that some rule or provision should be worked out whereby the truck lines should be required to make remittances on C. O. D.'s within at least five days after delivery of the shipment.

Q. Do you think that if the control of the White Line Motor Freight Company, Incorporated, and White Line Trucking Company, should pass to the Rock Island, or one of its subsidiaries, that insofar as C. O. D. settlements are concerned, the shipping public might expect prompt and expeditious service, is that true?

A. They would expect prompt and expeditious service, yes, sir.

Q. And would that be founded on the experience that you are acquainted with, insofar as the conduct of the business of the Chicago, Rock Island & Pacific Railway Company is concerned?

A. Yes, sir.

Q. In that connection, what is your view with respect to the probability of improving the service to the public, insofar as settlement of freight claims is concerned?

A. Well, it is the same answer I have made to the other, with the exception that with the operation by more reliable truck lines the settlement of freight claims, both for loss and damage and overcharge, would be benefited, to the  
207 public advantage.

Q. Do you think that the experience of The Chicago, Rock Island & Pacific Railway Company in its freight claim department may be made an advantage in stabilizing that angle of motor carrier transportation, insofar as this territory is concerned?

A. It would with respect to a large number of those operating within that territory today. I would not say it would improve the service with respect to all of them, because some of them are very reliable.

Q. Well, you think that insofar as any control by the Rock Island of a motor carrier operation such as is proposed here, it might in addition to the other things you have pointed out, include the establishing of what we might term a satisfactory disposition of freight claims?

A. I think the freight claims would be handled in a very satisfactory manner.

Q. Now, would the fact of the personnel of the railroad, and its supervisory officers, policing agents, freight handlers, and such as that, be of an advantage to the motor carrier operation?

A. It would be very much so.

Q. In other words, you feel that the experience the railroad company has had in establishing these various departments and employing a personnel of experience in  
208 transportation, might lend itself favorably to the motor carrier operation?

A. Yes, providing that motor carrier operation was owned completely by the railroad.

Q. All my questions along these lines are predicated upon the fact that this applicant is a wholly owned subsidiary of The Chicago, Rock Island & Pacific Railway Company, you understand that?

A. Yes.

Q. Now, I want to direct your attention to another excerpt from Section 213 of the Motor Carrier Act, to the effect that it must be indicated in a proceeding of this kind, that there shall not be an undue restraint of competition through a railroad company acquiring motor vehicle service. I want to ask you whether you have an opinion as to whether, if this acquisition should be authorized by the

Interstate Commerce Commission, the result might follow that there would be an undue restraint of competition? Have you an opinion on that point?

A. Yes.

Q. What is that opinion?

A. There possibly would be some elimination of competition, but it certainly would not be undue. There would be no undue restraint of competition. There are some parts of that territory which have numerous truck lines operating, I think, over approximately the same territory from Omaha to Chicago, and in addition to that—Oh, you  
209 have about seven or eight railroad lines that operate through that territory.

Q. Serving one or more of the points that are involved in this immediate application?

A. Yes, sir.

Q. And the motor carrier service that you have referred to as being competitive with any proposed service by the Rock Island, is of both contract and common carrier nature, isn't that true, insofar as you understand those designations?

A. Yes, sir.

Q. Have you any reasons to add in support of your opinions that you have offered here, about which I have not specifically questioned you, Mr. Wharton?

A. Well, I want an all-coordinated service, if that is what you have in mind.

Q. I am referring to any other reasons you have in support of the ones you have already given?

A. Well, in support of the opinion that the coordinated service would work to the advantage of the shipper, I can call attention to the fact that we worked out our own coordinated service from Omaha to points in the Black Hills of South Dakota and to the Big Horn Basin of Wyoming. Prior to the time we had that service it took from four to five days to make delivery out in the Black Hills of South Dakota from Omaha. We arranged to pool the shipments and forward them in carload lots from Omaha to Rapid  
210 City, from which point they are distributed through the Black Hills by trucks. The shipments leave Omaha in the afternoon and the following day all shipments are delivered in the Black Hills of South Dakota.

A similar shipment to the Big Horn Basin of Wyoming was accomplished with second day delivery. When we

started out we had two cars a week and had difficulty in gathering 20,000 pounds for the cars. We have now five cars per week and they are running around 40,000 pounds. That is what the shippers think of the service.

Q. And you in your work consider that it has been an improvement of the service to the advantage of the public?

A. Yes, sir.

Q. And you think that it would likewise be an improvement of service and would lend itself to the benefit of the public in this territory should the Rock Island be granted permission to acquire directly or indirectly the motor carrier service in question here?

A. I do, and in addition to that I might also call attention to the fact that we have to load their trucks on flat cars somewhat similar to the operation from Chicago to the Twin Cities, Minneapolis and St. Paul, over the Chicago Great Western by Keeshin.

Q. And that situation, you think, would have a possibility of development in this territory as well?

A. Yes.

211 EXAM. HIGGINS: Is there any evidence in this record up to now that the applicant in this case proposes to direct an operation similar to that conducted by Keeshin, or are you just guessing it is?

MR. BOE: I do not think we can be specific, but we are trying to point out to the Commission all the possibilities of this motor carrier operation, as to what they may be, and I think I might fairly say that the Rock Island Motor Transit Company, this applicant, and The Chicago, Rock Island & Pacific Railway Company, propose to utilize this service, if it be authorized, to the most economic advantage and with improvements in service that might be properly accomplished.

THE WITNESS: Another point I might make in that connection is that if the railroad owns and controls the truck line and this coordinated service was established, it would tend to accomplish many things which it could not accomplish in a coordinated service with a line which it did not own and control, for the reason that if it did not own and control the line, it would hesitate to give up shipments at intermediate points to be hauled by a truck line where it could on the other hand, although the service would be slower, make the delivery itself at the final destination and obtain all the revenue. If they owned the truck line with which the coordinated service was performed it would just

212 be a question of which pocket the money went into, whereas on the other hand it would be a dividing of the revenue with someone which they did not control or own.

Q. So that you think if the ownership and control were under a common management and direction that it would inure to the public advantage?

A. Yes, sir.

Mr. BOE: That is all I have, Mr. Shields.

### Cross Examination.

Q. (By Mr. SHIELDS) Mr. Wharton, you dwelt on the element of speed in the movement of freight traffic today. Do you think that it is necessary that the railroad control motor carrier operations it might use in coordinating the service in order to effect speed?

A. That is one of the elements, yes, and a very important element.

Q. What you mean to say is that one of the elements necessary to effect speed is control by the railroad of the motor carrier operations?

A. I think that is one of the very important elements.

Q. In what way is control necessary to effect the speed?

213 A. For the reason that if the railroad gets a shipment in Chicago and that shipment was going to some point intermediate between Omaha and Des Moines, if the railroad owned and controlled the truck line, they could run that as a solid car to Des Moines and then turn it over to their own truck line for delivery at the intermediate points, but the railroad would not be likely to turn that shipment over to a truck line at Des Moines and give up some of the revenue on that shipment, because they want all the revenue they can get themselves, and they do not want to be short-hauled.

Q. On the other hand, if the railroad was interested in giving to the shipping public the most expeditious service, why should that objection you have raised enter into it? If the service is available, why should they hesitate?

A. They are interested in giving the service, but before they can give the service they must have the revenue with which to do it.

Q. Don't you think that if the expedited service was made available they would be better off due to the resulting tonnage increase? Would not the argument work both ways?

A. It is true the speed of that service would bring additional tonnage, and the shipping public would not worry as long as they got the service, but the railroad could not be expected to give up their revenue in putting in that expedited service and giving part of their revenue to an outside trucker for making deliveries to intermediate points on the railroad's own line.

Q. The reason, as I gather, why you advanced the argument of control is because, we will say, of a certain selfish interest of the railroad in splitting revenue on a split shipment?

214 A. Well, you might call it selfish interest.

Q. I have used the term advisedly.

A. We are all more or less of a selfish disposition, I think, and I would not particularly blame the railroads for having a selfish interest in a situation of that kind.

Q. Now, as to the C. O. D.'s and claims being handled in a better manner under control of the railroad, have you in mind any specific instances as to the Keeshin Express Company?

A. No, not Keeshin, you pay up promptly on your claims, and C. O. D.'s.

Q. But you are dealing here with a specific operation—

A. We are dealing here with the White Lines.

Q. But you are advancing an argument and I am calling for the argument you apply in this case.

A. I would not say that the purchase of the White Lines by the Rock Island would or—well, I would not say it would not. They have had more experience in the handling of claims than the White Line Motor Freight Company, and as to the handling of those claims they have had—Oh, some sixty years experience as compared to some two or three years on the part of the White Line Company, so you can see the comparison as to experience.

Q. Is it necessary to have experience in the handling of these claims?

A. We have found it so.

215 Q. You spoke of coordinated service that had been worked out from Omaha to the Black Hills country, and the Big Horn Basin?

A. Yes, sir.

Q. Was that service involved with motor carrier operations that were wholly controlled by the railroad?

A. No, sir, they were not controlled by the railroad in any way.

Q. Then you will admit it is possible to work out a satisfactory service where the control is not in the hands of a railroad?

A. It is not only possible, but we have it. We use the railroad earload rate.

Q. And you cite that as a specific example?

A. Yes, sir.

Q. And one with which you have had personal experience?

A. Yes, sir.

Q. Now, do you think that that also could be applied to the movement of trailers on flat cars which you mentioned?

A. I think the movement of trailers on flat cars has proved to be of big aid to the shipper.

Q. I am inquiring as to whether control is necessary by the railroad.

A. Well, it is not necessary, but it is a big advantage if they have control. They could do many things they would not do otherwise.

216 Q. Do you know of any such movement as that where the motor carrier is controlled by a railroad?

A. No, I do not.

Q. Do you know of any that is not controlled by the railroad?

A. Yes.

Q. Those are the few that you dealt with on direct?

A. Yes, sir.

Mr. SHIELDS: I believe that is all.

#### Re-direct Examination.

Q. (By Mr. BOE) I want to ask one question on re-direct, if I may.

Mr. Shields asked you whether you had in mind that this service that is proposed to be established by the railroad company would be prompted more by selfish considerations than those that involve the public interest; in substance, that. Now, isn't it true that your opinions are founded upon the fact that the public interest would be benefited by this acquisition that is proposed in this application, as separate and apart from the selfish interests of the Rock Island or its subsidiary?

A. Well, as far as the public is concerned, there is no question but what they would obtain an advantage, but nevertheless, regardless of whether the speedy service was under a line that was owned and controlled by the railroad, the shipper's concern would be what service he got? And

217 he would be benefited by any improved schedules that would result from such control by a railroad of motor carrier operations?

A. Yes, sir.

Q. That would follow as a matter of logic, would it not?

A. Yes, sir.

Q. Now, would the fact that common control, both of the motor carrier operation and the rail operation was centered in one interest rather than in two distinct interests, tend more favorably toward the establishment of schedules that would primarily afford the most superior service?

A. Yes, sir.

Q. So that you think if the Rock Island had control of some motor carrier insofar as it would be in position to establish a superior motor carrier service it would be in a better position than it would be if it was required to negotiate with some independent agency to establish a coordinated service?

A. I do.

Q. Each agency would have its own self interest to take into account in agreeing between themselves about that coordination?

A. Yes, sir.

Q. And that factor would be entirely eliminated if the control was centered in one agency, is that true?

A. That is true.

Mr. BOE: That is all.

218 Q. (By Exam. Higgins) Did I understand you to say that in your opinion you consider a single line haul of greater benefit to shippers than a connecting line rate adjustment? Was not that what in effect you intended to say when you had the whole movement under the control of a single directing head?

A. Yes, sir.

Q. That is in effect what you meant?

A. Yes.

Q. That you could make better connecting arrangements and effect better coordination where you could control the facilities of each carrier involved?

A. Yes.

Q. Than where you are dealing with independents?

A. Yes, sir.

Q. Do you know whether there were any shippers at any of the intermediate small points on the routes here involved, that had complained either to you or the Chamber of

Commerce at Omaha that they were not receiving the same character of service as the main line points?

A. Well, now, the only complaint you get from them is that the service by the railroads to those points is so slow that they are forced to use trucks to get there.

Q. Has there been such complaint made as that?

A. Yes.

Q. To you personally?

A. Yes.

219 Q. And to your organization?

A. Yes, sir.

Q. You heard the testimony this morning to the effect that there was second morning delivery out of Chicago by rail to Des Moines and third morning delivery to a town called Booneville, which is only 14 miles west of Des Moines?

A. Yes, sir.

Q. Does that same situation exist at other intermediate points known to you?

A. Well, I couldn't name any points.

Q. Do you know that it does, without being able to name the points?

A. Yes, I do.

Exam. HIGGINS: I think that is all.

Mr. BOE: Thank you, Mr. Wharton.

(Witness excused.)

Mr. BOE: Now, if your Honor please, I would like to offer to stipulate that three other men who are here from Omaha, if called as witnesses, would testify substantially as Mr. Wharton has testified, and I would like to call Mr. Hartnett, Mr. Barnett, and Mr. Stender to the front, if they are here, and ask that they be sworn.

Exam. HIGGINS: Are these gentlemen all from Omaha?

Mr. BOE: They are all from Omaha.

220 A. J. HARTNETT was sworn and testified as follows:

#### Direct Examination.

Q. (By Mr. BOE) Give your name and address to the reporter.

A. A. J. Hartnett.

Q. What is your address?

A. Omaha, Nebraska.

Q. What is your business or occupation?

A. Traffic manager of Paxton & Gallagher Company.

Q. In what business is Paxton & Gallagher Company engaged?

A. Wholesale jobbers of groceries and hardware.

Q. How long have you been connected with that company?

A. Since January, 1932.

Q. And do you have anything to do with arranging for the receipt and forwarding of shipments of that company?

A. I do.

Q. Have you any official connection with the Omaha Chamber of Commerce?

A. I have.

Q. What is that connection?

A. I am chairman of the Transportation Committee.

Q. Are you a licensed practitioner before the Interstate Commerce Commission?

A. I am not.

Q. How long have you been Chairman of the Transportation Committee of the Omaha Chamber of Commerce?

221 A. I am serving my second year.

Q. Were you present during the direct and cross examination and examination by the Examiner of the preceding witness, Mr. Walter M. Wharton?

A. I was.

Q. And you heard the questions asked and the answers given?

A. I did.

Q. If I asked you substantially the same questions that I asked Mr. Wharton, and if the questions on cross examination were substantially of the same character as well as those of the Examiner, would your answers be substantially the same as those given by Mr. Wharton?

A. Yes, sir.

Mr. BOE: That is all.

Q. (By Exam. HIGGINS) Does your company patronize the White Lines?

A. To a certain extent, yes.

Q. Do you ship to points on their lines?

A. Yes.

Q. Direct by truck?

A. Direct by truck.

Q. You also patronize the services of The Chicago, Rock Island & Pacific Railroad Company?

A. We do.

222 Q. Have you given any thought as to whether or not a coordinated rail-truck service in the manner proposed—and, by the way, you heard the testimony up to now, did you?

A. Yes.

Q. —would be of benefit to your concern as a shipper?

A. We feel it would because it would give the Rock Island a more flexible service. As several of the witnesses pointed out they could effect economies and broaden their schedules, make faster schedules and earlier deliveries.

Q. You feel that would be of benefit to your concern as a shipper?

A. I do.

Q. Expedite the service?

A. I do.

Q. And make delivery by truck from certain other points as against all-rail service?

A. I do.

#### Cross Examination.

Q. (By Mr. SHIELDS) Are you appearing on behalf of your company or on behalf of the Chamber of Commerce?

A. Either way, it is all right, or both.

Q. Has the Chamber of Commerce or the Transportation Committee of the Chamber of Commerce passed on this proposal?

A. I will be glad to qualify as a witness for Paxton & Gallagher.

Q. And not as appearing here for the Transportation Committee of the Chamber of Commerce?

A. That is right.

Mr. SHIELDS: That is all.

(Witness excused.)

H. C. STENDER WAS SWORN and testified as follows:

#### Direct Examination.

Q. (By Mr. BOE) Will you give your name and address.

A. H. C. Stender; Omaha, Nebraska.

Q. What is your business or occupation, Mr. Stender?

A. Traffic manager for the Baker Ice Machine Company.

Q. And what business is the Baker Ice Machine Company in?

A. Manufacturing ice machinery and air conditioning equipment.

Q. How long have you been connected with this company?

A. Since April 19, 1926.

Q. And specifically as to what character of duties do you perform for that company?

A. General supervision of transportation matters.

Q. Are you a licensed practitioner—

A. Yes, sir.

Q. —before the Interstate Commerce Commission?

A. Yes, sir.

Q. Were you present during the giving of the testimony of Mr. W. M. Wharton, a preceding witness?

A. Yes, sir.

224 Q. And heard all questions asked him by the Examiner, and also on direct and cross examination?

A. Yes, sir.

Q. And if those questions were repeated and directly asked of you at this time, would your answers be substantially the same as those made by Mr. Wharton?

A. Yes, sir.

Q. Does the Baker Ice Machine Company at the present time avail itself of service of the White Line Motor Freight Company?

A. To a certain extent, yes, sir.

Q. And is that also true as to the service of The Chicago, Rock Island & Pacific Railway Company?

A. Yes, sir.

Mr. BOE: That is all.

Exam. HIGGINS: That is all. Thank you.

(Witness excused.)

H. A. BARNETT was sworn and testified as follows:

#### Direct Examination.

Q. (By Mr. BOE) Will you give your name and address?

A. H. A. Barnett; Omaha, Nebraska.

Q. And what is your business or occupation, Mr. Barnett?

A. I am traffic manager for Eggerss O'Flying Company.

Q. What character of business is conducted by that company?

225 A. They are manufacturers of paper boxes, cartons and containers.

Q. And how long have you been connected with this company?

A. Since August 13, 1928.

Q. And what, generally, have been and are your duties as traffic manager?

A. I have charge of all matters pertaining to traffic and transportation.

Q. Are you a licensed practitioner before the Interstate Commerce Commission?

A. Yes, sir.

Q. Were you present during the giving of the testimony of Mr. W. M. Wharton, a preceding witness?

A. Yes, sir.

Q. And you heard the questions asked on direct examination and cross examination and also by the Examiner, of Mr. Wharton?

A. Yes, sir.

Q. And you heard the answers given by Mr. Wharton, did you?

A. Yes, sir.

Q. If the same questions were asked you at this time, would your answers be substantially the same as those given by Mr. Wharton?

A. They would, yes, sir.

Mr. BOE: That is all.

Q. (By Exam. HIGGINS) Do you ship over the White Lines?

A. We do, yes, sir.

226 Q. Out of Omaha?

A. Yes, sir.

Q. Do you also patronize the railroads?

A. Yes, sir.

Q. That is the The Chicago, Rock Island & Pacific Railway Company?

A. Yes, sir, the Rock Island and the White Line.

Q. In your opinion, if the service between Chicago and Omaha were combined rail and truck, do you feel that under the proposal here your company would be better served?

A. I think it would, particularly with respect to the smaller towns where they could ship a car, for example, from Omaha to Des Moines and then the smaller towns from there they could take care of by truck service.

Q. Do you ship your products to the smaller towns as well as the main towns?

A. We do all through that territory.

Q. And you are authorized to speak for your company?

A. I am, yes, sir.

Exam. HIGGINS: That is all.

Mr. BOE: Thank you, Mr. Barnett.

(Witness excused.)

Mr. BOE: I will next call Mr. Thompson. Do you want to swear all the other witnesses at this time, Mr. Examiner?

Exam. HIGGINS: I think we can.

227 Mr. BOE: Will all the other witnesses step forward and be sworn?

(Witnesses sworn en masse.)

R. H. THOMPSON was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you give your name and address to the reporter?

A. Newton, Iowa. I have already given my name.

Q. What is your position, Mr. Thompson?

A. I am traffic manager of the Maytag Company.

Q. And where is the Maytag Company located?

A. Newton, Iowa.

Q. And in what business is it engaged?

A. In the manufacture of washing machines and ironing machines.

Q. And how long have you been engaged with the Maytag Company?

A. Since May 1, 1925.

Q. In charge of traffic matters?

A. Yes, sir.

Q. Does your company utilize both motor carrier and rail service?

A. Yes.

Q. Are you familiar in a general way with the service that is provided by The Chicago, Rock Island & Pacific Railway Company?

228 A. Yes, sir.

Q. Into Newton and beyond?

A. Yes, sir.

Q. Are you familiar with the service of the White Line Motor Freight Company, in a general way?

A. Yes, sir.

Q. Were you present during the examination of Mr. W. M. Wharton of Omaha?

A. Yes, sir.

Q. And did you hear the questions asked on direct examination and cross examination and by the Examiner?

A. Yes, sir.

\*Q. And the answers that were given in response to those questions?

A. Yes, sir.

Q. If you were asked the same questions, would your answers be substantially the same, Mr. Thompson?

A. Except that portion referring to handling in the Black Hills and the Wyoming points, of which I would not have any knowledge.

Q. You are not acquainted with them?

A. I wouldn't say that I was at all.

Q. You exclude that from your testimony?

A. Yes.

Q. Is there anything with respect to the city of Newton that you might add, in addition to other testimony  
229 you might give along the lines indicated that you might give at this time?

A. As I say,—or, rather, as I see it, the coordination of that service would increase the efficiency of the trucking department, in that the local personnel of the Rock Island office station force could be used. The railroad procedure is well known and efficient, while the trucking lines, as I see it, are rather groping in the dark, and the manner of handling collections for statements and freight hauled, is very inefficient; while if you had your coordinated service your collections could be made and handled the same way at local points.

Another angle I would say in speaking of coordinated service would be the elimination of the combination of local rates. If you had through coordinated service you would have one rate from point to point, while if you have a service of rail and truck not owned or merged you would have a combination of locals which would increase the cost to the general public.

The handling of claims, as I see it, would be much more efficient. Knowing the Rock Island claim department as I do, I could not ask for any better service. In my limited experience with trucks, however, the claim settlements have been very discouraging.

Q. And you are appearing here in your official capacity as traffic manager of the Maytag Company?

A. Yes, sir.

230 Mr. BOE: Thank you, Mr. Thompson.

Q. (By Exam. HIGGINS) Did I understand you to say you patronize the White Lines out of Newton as well as the Rock Island railroad?

A. Yes, sir, we patronize them to a limited extent, not a great deal.

Q. Is that because of the nature of your business?

A. No, sir, not necessarily. It is a matter of a contract.

Q. What is the nature of your company at Newton, Iowa?

A. It is a manufacturing plant.

Q. Do you use trucking facilities for inbound shipments?

A. There are a few cases where we use them, but to a very limited extent.

Q. (By Mr. BOE) How large is Newton, Mr. Thompson?

A. 11,000.

Q. (By Exam. HIGGINS) Do you feel that the coordinated rail-truck service here proposed would be of benefit to your concern?

A. It would be of great benefit to the local points in the State of Iowa served by the White Line Motor Freight Company, and I might give you an example. The Rock Island railroad now operates a local freight one day, one way and back the next. Now, for instance, if we made a shipment today to Iowa City, 90 miles, why, the local train might be going the other way and that would not move until to-  
 231 morrow and would move through Marengo, about half way, and the next day would be transferred there and the next day would go beyond over to Iowa City, a distance of 90 miles, and would give three days, while the trucks would take it over there the next morning, or if you got it out in the morning it would get over there the same day.

Now, we have never used trucks for C. O. D. shipments, and we feel, if this coordinated service was brought about, that we would be able to offer C. O. D. shipments to the Rock Island Company, the Rock Island Motor Transit Company, and we would be fully protected the same as we are by rail, and they would handle our collections through the banks the same as they do on any rail shipment or bill of lading.

#### Cross Examination.

Q. (By Mr. SHIELDS) Mr. Thompson, isn't it the practice of your company to a certain extent at least to use contract carriers?

A. Not our company, no.

Q. You use no contract motor carriers?

A. No, not the Maytag Company.

Q. Is that true of these two points in Kansas?

A. Yes, sir. All the trucking that is done from Newton is arranged for by contract with our dealers. We sell f. o. b. Newton.

Q. Is that true on shipments that go forward on common motor carriers?

232 A. Go forward on what?

Q. On common motor carriers.

A. No, on C. O. D.'s.

Q. I am not speaking of C. O. D.'s now, I am—

A. I did not quite understand you.

Q. Do you arrange the transportation service or does the dealer, or your customer?

A. Our customers arrange it, and because we have never used trucks for C. O. D. shipments, we require certified check at the time of delivery of the shipments.

Q. Are all of your shipments handled f. o. b. Newton?

A. Yes, sir.

Q. By that you mean that your customers in every instance designate the transportation service?

A. Yes, sir.

Q. You stated that where two motor carriers were involved that it was necessary there be a combination of local rates?

A. Not two motor carriers; rail and motor.

Q. Yes. Why is that necessary?

A. Because there are no through rates in effect.

Q. Why are there no through rates in effect?

A. Between rail and motor carriers?

Q. Yes.

A. I don't know of any. There may be.

233 Q. What is your objection to there being a through rate between a rail and motor carrier?

A. There is no objection to it.

Q. It can be arranged, then?

A. Yes, sir.

Exam HIGGINS: Off the record.

(Discussion outside the record.)

Q. (By Mr. SHIELDS) One other question. You spoke of Marengo. Do you have truck service to that point now?

A. The White Line operates through Marengo.

Q. From Newton to Marengo?

A. Yes, sir.

Q. Do you use that service?

Q. Our dealer there does. We would not use it ourselves, of course.

Q. Are you acquainted with that service?

A. Yes.

Q. Is it satisfactory?

A. Well, I can't state whether the White Line operates through Marengo or not—I refer to Iowa City, to the shipments there transferred.

Mr. BOE: You were describing the shipments by rail.

The WITNESS: Movement by rail and not by truck.

Q. (By Mr. SHIELDS) Do you know what service is available to you between Newton and Marengo?

A. Between Newton and Iowa City the rail service.

234 Q. Are you familiar with the truck service there?

A. It would be over-night. I would not be able to give you the details of it, how it was worked out.

Q. It was intrastate?

A. Yes, sir.

Q. (By Exam. HIGGINS) By the way, you make distribution to dealers and not to the ultimate consumers?

A. Yes.

Q. You sell to dealers?

A. Yes.

Q. Do any of those dealers make use of the White Line facilities as far as you know?

A. They do, yes, sir.

Q. They do?

A. Yes.

Q. So that you have some personal familiarity with that service?

A. Yes.

Q. I understand you to say if this acquisition was approved, you would continue to patronize the Rock Island and its subsidiaries in a rail-truck movement?

A. Yes, sir.

Q. And you would make use of C. O. D. shipments?

A. Yes, sir.

Q. Is that what you said?

A. Yes.

235 Q. You have not been doing that heretofore?

A. No, sir.

Exam. HIGGINS: All right. That is all.

Mr. BOE: Thank you very much, Mr. Thompson.

(Witness excused.)

H. R. VAN MAREN was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you give your name and address, please.

A. H. R. Van Maren; traffic manager of The Armand Company, Des Moines, Iowa.

Q. How long have you been connected with that company?

A. Thirteen years.

Q. And what business is The Armand Company engaged?

A. Cosmetics manufacturer.

Q. And as traffic manager, I take it you are in charge of the transportation matters of that company?

A. I am.

Q. And that in the performance of your duties you are personally acquainted to a greater or less extent with the transportation agencies that service the territory involved in this application?

A. I am.

Q. Were you present when a previous witness testified, Mr. W. M. Wharton of Omaha, Nebraska?

236 A. I was.

Q. Did you hear the questions asked and the answers given by Mr. Wharton?

A. I did.

Q. And if those questions were asked of you at this time, would your answers be substantially the same as those given by Mr. Wharton?

A. With the exception of the mention of Rapid City, South Dakota—

Q. I see.

A. —with which I am not familiar.

Q. Have you anything to add peculiar to your business that would be pertinent to this proceeding at this time?

A. Yes, I have. The Armand Company allow all transportation charges on all outbound shipments. We therefore control the routing. The only problem that we have today in connection with what we term two line hauls, truck movements, for example, we will say to Cleveland, Ohio, the question has always arisen as to who is the responsible party in case of damage. The reason we favor this co-ordination is because we would then have an originating carrier who, through long years of experience, has gone through at least the minor difficulties of getting interline settlements, and the responsibility would entirely be assumed by one who is, you might say, better adapted and better off financially to handle such grievances.

237 Now, when we come to the matter of C. O. D. shipments, and we have had some of those, and we have had considerable delay in getting the remittances back to us. I do not want to say that that is a common situation, or you might say one that covers the entire motor trucking industry. There are some exceptions, and those have proved satisfactory.

Mr. BOE: Thank you, Mr. Van Maren. No further questions.

Exam. HIGGINS: Mr. Shields?

Mr. SHIELDS: No questions.

Q. (By Exam. HIGGINS) Do you utilize the White Line and the Rock Island?

A. I do.

Q. Both?

A. Yes, sir.

Q. Do you feel that a combination of their services, rail and truck, under the circumstances as stated by previous witnesses,—and I assume you heard their testimony?

A. I have.

Q. Would give better service to your company?

A. I assume it would give much better service to our company.

Q. Expedite deliveries?

A. Not only expedite deliveries, but assure us of delivery.

Q. Have you had some difficulty in that regard in the past?

A. Considerable, being delayed at terminals, for example.

Exam. HIGGINS: I think that is all I have.

## 238 Cross Examination.

Q. (By Mr. SHIELDS) You spoke of a two line haul, motor carrier?

A. That is right.

Q. I think you were referring from Des Moines to Cleveland, were you not?

A. That would be an example.

Q. Do you know that the Keeshin Motor Express Co. run a motor carrier operation from Des Moines, Iowa, to Cleveland, Ohio?

A. I do.

Q. Have you any objection to that service?

A. I don't favor it. That is personal entirely.

Q. Do you think it is necessary where a two line is involved, and where coordination can be worked out, that it be controlled by the railroad?

A. I might say I am very much railroad minded. The only reason I am truck minded at the present time is because of the splitting up of the service of deliveries. I don't deny that I am railroad minded.

Q. I did not mean to inquire as to that. I had in mind only the service involved. Now, you have just stated that there was some advantage as to speed by using the motor carrier service.

A. Yes, sir.

239 Q. Do you think the speed could be further augmented by placing that service under control of the railroad?

A. I think that it could, yes; I feel it.

Q. What is your reason for that?

A. Well, I have stated my reason. Des Moines is close to that over-night service, to Chicago via connecting lines. Now, I appreciate your asking that, because our delays, as I said, are in the terminals at Chicago. It is a known fact, I think, and I do not believe any motor carrier will deny it, that every motor carrier operating out of Chicago has no trouble getting tonnage out of Chicago. It is his return loads that bother him. I feel if it was in the hands of a railway or the Rock Island Transit Company, I feel, I say, quite sure from past experience that the railroads we have would get rid of this merchandise and not let it lie down there at their terminals and wait until such time as the connecting line could pick it up for you. I have experienced delays as high as seven days in the terminals in Chicago.

Q. Have you ever experienced any delays with the rail service?

A. Not of any consequence. I might say twenty-four hours. I would be safe in saying that.

Q. What percentage of your business is shipped by rail?

A. About fifty per cent.

Q. I don't believe you are so rail minded if you divide it up that way.

A. Well, rates naturally enter into that.

240 Mr. SHIELDS: That is all, Mr. Van Maren.

(Witness excused.)

Mr. BOE: Mr. Crouse.

C. C. CROUSE was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you give your name and address to the reporter?

A. C. C. Crouse.

Q. What is your business or occupation?

A. Manager of the Traffic Bureau, Des Moines Chamber of Commerce.

Q. That is located at Des Moines, Iowa?

A. Yes, sir.

Q. How large a membership does the Des Moines Chamber of Commerce have?

A. I should judge in the neighborhood of 750 or 800 members.

Q. Composed of various types of individuals and corporations doing business in the city of Des Moines or in its immediate vicinity, is that true?

A. Yes, sir, Des Moines only.

Q. How long have you been connected with the Des Moines Chamber of Commerce?

A. Since the Traffic Bureau was established, in May, 1928.

241 Q. Were you present during the giving of the testimony by Mr. W. M. Wharton, a preceding witness?

A. Most of it.

Q. Did you hear the questions asked on direct examination, cross examination, and by the Examiner?

A. Yes, sir.

Q. If those questions were asked you at this time, would your answers be substantially the same as those given by Mr. Wharton?

A. I believe they would.

Q. Have you anything to add in addition to what was testified to by Mr. Wharton with respect to your peculiar experience as to the city of Des Moines?

A. No, I believe not, with the probable exception that the service might be expedited insofar as distribution from Des Moines is concerned, that it is now proposed to set up here.

Q. What service do you have in mind in that connection?

A. Well, for example, our merchandise, speaking of less carload lots moves from Des Moines in way freight trains between Des Moines and Omaha, excluding Omaha and Council Bluffs, and arrives in the morning. The proposed set-up would allow trucks to move from Des Moines during the night and freight deposited in the railway stations to be delivered early the next morning. It would expedite the delivery of all freight at the intermediate points.

242 That is not possible at the present time, either by truck or by rail. Your present truck service would be improved and your present rail service would be improved, and the White Line is the only line which we can use in our distribution along this particular highway.

Exam. HIGGINS: That is, from where to where?

The WITNESS: From Des Moines.

Exam. HIGGINS: To where?

The WITNESS: To points intermediate to Omaha, and points intermediate Omaha to Tri-Cities.

Exam. HIGGINS: The White Line is the only operator?

The WITNESS: That is true.

Exam. HIGGINS: The only line between Des Moines and Omaha?

The WITNESS: That is right.

Q. (By Mr. BOE) You are speaking now of intrastate transportation?

A. Yes, sir.

Q. You have not included in this statement any contract carriers' operations that extend from Des Moines?

A. No, none whatsoever.

Q. To intermediate points between Des Moines and Council Bluffs?

A. No, we have any number of contracts out there.

Q. So you are not intending to have your answer understood to mean that the service of the White Line Motor Freight Company is the only motor carrier service operated between Des Moines and Council Bluffs?

243 A. It is the only common carrier motor service.

Mr. BOE: I see. Thank you, Mr. Crouse.

#### Cross Examination.

Q. (By Mr. SHIELDS) I only want to ask you, are you appearing here on behalf of the Des Moines Chamber of Commerce?

A. Yes, with authority I have from the board of directors.

Q. Did they pass on this matter?

A. Yes, sir.

Q. And instruct you to appear at the hearing in support of the application?

A. They did.

Q. To what extent is the Des Moines Chamber of Commerce interested in this proposed service between the Tri-Cities and Chicago?

A. I don't know that we would have any particular interest in it between Chicago and the Tri-Cities.

Q. Then your testimony so far would not apply to any of that traffic?

A. It applies to Des Moines.

Q. I know, but I mean between the Tri-Cities and Chicago?

A. Not particularly, no.

Exam. HIGGINS: The applicant does not propose to serve any points intermediate between the Tri-Cities and Chicago, anyhow?

Mr. BOE: That is right.

244 Exam. HIGGINS: But it does propose to serve the Tri-Cities and Chicago?

Mr. BOE: That is right.

Exam. HIGGINS: Does the railroad now serve both of those points?

Mr. SHIELDS: That is what I had in mind.

Exam. HIGGINS: I don't know whether I have made myself clear or not.

The service intermediate between Des Moines and Omaha and Des Moines and Tri-Cities, so far as the State of Iowa is concerned, is entirely intrastate, is it not?

The WITNESS: Yes, sir.

Q. (By Exam. HIGGINS) And whether this application was or was not allowed, it would not affect that service, would it?

A. It depends upon what disposition would be made of the certificate.

Q. The intrastate certificate?

A. The intrastate certificate.

Q. You are not anticipating that service being abandoned, are you?

A. No.

Q. Is the applicant going to acquire any intrastate rights possessed by either of the White Companies?

Mr. BOE: That is right.

Exam. HIGGINS: Between where and where?

245 Mr. BOE: Between all points on the routes that are specified on the map, such intrastate rights as the White Line Motor Freight Company and White Line Trucking Company possess, as specifically enumerated in the contract before the Commission, under consideration, and this applicant as set forth in that contract alleges will be transferred to the Rock Island Motor Transit Company, and I might say there is a contemplated transfer of those intrastate rights, so far as they may be feasibly transferred under the law.

Exam. HIGGINS: You propose obtaining whatever grandfather rights the White Line Companies possess between Chicago and Omaha?

Mr. BOE: That is right.

Exam. HIGGINS: That is interstate rights.

Mr. BOE: Yes.

Exam. HIGGINS: And whatever intrastate rights they possess between the same points?

Mr. BOE: That is right.

Mr. SHIELDS: That, of course, is based on the assumption that the proper jurisdiction in Iowa passes upon the proposition.

Exam. HIGGINS: Oh, yes.

Mr. BOE: Oh, yes.

Q. (By Mr. SHIELDS) I wanted to ask one more question, Mr. Crouse, pertaining to the service between Des  
246 Moines and Omaha to points in Iowa intrastate; does the White Line handle that at the present time?

A. Des Moines to where?

Q. Des Moines and points in Iowa to Omaha.

A. I think you have several of them in that question. The White Line renders service from Des Moines to all points in and around Omaha.

Q. Intrastate?

A. Intrastate, yes.

Q. Are you sure of that?

A. Well, there may be one or two exceptions, but I don't know what they are. There would be an exception of three stations, the stations of Martelle, Adel, and Redfield. They do not have any intrastate rights between those stations. Then coming east from Council Bluffs to Des Moines, there are certain restrictions in there, I cannot enumerate all those just at the present time.

Q. (By Exam. HIGGINS) Now, when you spoke of deliveries during the night and early morning service to consignees at the setout points, did you have in mind a rail service during the night to some set-out points?

A. No, truck service during the night.

Q. Truck service during the night?

A. Yes, set out at the rail stations.

Q. And then is that delivered to the rail stations  
247 in both trucks and—

A. Yes, sir, give early morning delivery.

Q. That would be exclusively a truck service, regardless of the fact that your traffic came off the rails?

A. That is true.

Q. Is there any testimony up to now that it is proposed to inaugurate a truck service of the character assumed in his answer?

Mr. BOE: There is not up to now.

Exam. HIGGINS: Will there be?

Mr. BOE: I did not know anything,—or, rather, there is the intent to inaugurate that type of service.

May I ask this question: The type of service just referred to would be made available where it is not now available, by truck, is that right?

The WITNESS: That is true.

Exam. HIGGINS: Would that be under circumstances where, after virtually loading a train light you wanted to get it over, to get your storage?

Mr. BOE: That would be true.

Exam. HIGGINS: That would be a clean-up of freight?

Mr. BOE: Yes. Now, it is the intent to make delivery, early morning delivery.

Exam. HIGGINS: By truck?

Mr. BOE: By truck.

248 Exam. HIGGINS: And I assume that would be in cases where there would be an accumulation of freight which began at night and consequently was business that practically would be held over?

Mr. BOE: That is right.

Exam. HIGGINS: And by moving it out at night you would endeavor to get merchandise to the intermediate points for early morning delivery, or, in other words, establish at those intermediate points the same kind of service the merchants received at the larger points?

Mr. BOE: Yes, sir.

Exam. HIGGINS: That is all.

(Witness excused.)

Exam. HIGGINS: Is Mr. Scanlan here, of the Pioneer Motor Express?

Mr. SCANLAN: Yes.

Exam. HIGGINS: Have you been admitted to practice before the Interstate Commerce Commission?

Mr. SCANLAN: Yes.

Exam. HIGGINS: Do you want to show your appearance as an interested party, without taking an active part in the case, or introducing any evidence?

Mr. SCANLAN: We will wish to introduce some evidence.

Exam. HIGGINS: Under those circumstances, will you undertake to file a written plea of intervention?

249 Mr. SCANLAN: Yes, sir.

Exam. HIGGINS: Are you prepared to do that now?

Mr. SCANLAN: I will have to go to my office to do it.

Exam. HIGGINS: I will give you ten days in which to file a written petition of intervention, and I will ask you to make service of your written pleading on all other parties of record, and you will do that by the 28th of November?

Mr. SCANLAN: All right.

Exam. HIGGINS: And send about three copies to the Interstate Commerce Commission, Bureau of Motor Carriers, Washington, D. C., and make service on the other parties,

and if you do introduce any evidence I will ask you to give me your assurance that your petition will not unduly broaden the issues in this proceeding.

Mr. BOE: Your Honor, is it out of order to ask Mr. Scanlan to state what his position is at the present time, for the record?

Exam. HIGGINS: Not at all. I will be glad to hear that myself.

Mr. BOE: I think we are entitled to that.

Mr. SCANLAN: My sole interest is to see that this control or acquisition, if and when granted, shall not unduly restrain competition and shall not be an undue detriment to the common carriers remaining in the field, independently.

Mr. BOE: In view of that limited scope of the intervention, I think he ought to be required to proceed today if the case reaches a point where it can be closed today, so that it will not be held open for additional evidence on that point.

Mr. SCANLAN: I will not ask you to adjourn it at all.

Mr. BOE: I do not want to foreclose Mr. Scanlan from producing in evidence just what he considers pertinent to that point, but I do object to a prolongation of the proceedings to enable him to offer evidence on it in view of the fact that that question has been gone into extensively today, and this is the time for hearing evidence on that point.

Exam. HIGGINS: Are you going to answer that?

Mr. SCANLAN: I wish to apologize to the Examiner and counsel. I was only told of this late this afternoon, and I will not ask that you hold it over an hour.

Mr. BOE: I just wanted to make that point clear, that was all.

Exam. HIGGINS: The petition will be received.

Mr. GILLEN: If the Examiner please, I was not present this morning when the hearing opened, because I did not receive the notice stating the time of hearing from 2 o'clock P. M. to 9 o'clock this morning, but at this time I would like to ask leave to enter the appearance of Walter McFarland, Russell B. James and James A. Gillen, on behalf of Chicago, Burlington & Quincy Railroad Company, and Burlington Transportation Company, as interveners as their interests may appear.

251 Mr. McFarland and Mr. James are not present. All three gentlemen are admitted to practice before the Interstate Commerce Commission.

I should also like to ask leave at this time to file a written petition of intervention on behalf of those interveners.

Mr. BOE: In addition to what you have offered?

Mr. GILLEN: Yes, both will be interested under the circumstances.

A. J. MULHERN was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Have you given your name and address to the reporter?

A. I have just given him my name and my address is Chicago, Illinois.

Q. What is your business or occupation?

A. Assistant to the general traffic manager of the Bemis Bros. Bag Company.

Q. Where do you have your office, in Chicago?

A. In Chicago, yes, sir. That is the general traffic office, general traffic department.

Q. The Bemis Bros. Bag Company has a place of business in Chicago and you are assigned to that office?

A. They have a sales branch here and the general  
252 traffic department. No factory.

Q. Does the Bemis Bros. Bag Company have a place of business at any other points than Chicago, that are involved in this application?

A. Omaha, Nebraska.

Q. And how long have you been connected with the Bemis Bros. Bag Company?

A. Going on eleven years.

Q. And your assignment has been directed toward transportation matters?

A. Transportation matters, yes, sir.

Q. Insofar as they concern the Bemis Bag Company.

A. Right.

Q. That is true?

A. Yes.

Q. In what business is the Bemis Bag Company?

A. Manufacturer of burlap, cotton and paper bags.

Q. And in the conduct of that business the Bemis Bros. Bag Company uses transportation agencies in the forwarding of shipments and in the receipt of shipments, is that true?

A. That is true.

Q. Does the place of business at Omaha of the Bemis Bag Company forward shipments?

A. Yes, sir.

Q. Does it receive shipments?

253 A. Yes, sir.

Q. By rail and by truck?

A. Yes, sir.

Q. Now, were you present when the testimony was given by a preceding witness by the name of W. M. Wharton, of Omaha?

A. Yes, sir, I was.

Q. Did you hear the questions asked that witness on direct examination and on cross examination and by the Examiner?

A. Yes, sir.

Q. And if such questions were put to you at this time would your answers be substantially the same as the answers given by Mr. Wharton?

A. Yes, I would say they would.

Q. Have you anything to add to that testimony which is peculiar to the business of the Bemis Bros. Bag Company?

A. No.

Mr. BOE: Thank you, Mr. Mulhern.

#### Cross Examination.

Q. (By Mr. SHIELDS) Do you use the Rock Island between Chicago and the Tri-Cities?

A. Now, you are speaking of local. We do not have a factory in Chicago, so we would not ship out of Chicago unless there were shipments coming from the east.

Q. Do you have any occasion to forward shipments between the point of Chicago and either one of the Tri-Cities?

254 A. No, sir.

Q. You do not?

A. No, sir.

Q. And your testimony here is not as to that service?

A. No, sir.

#### Re-direct Examination.

Q. (By Mr. BOE) What territory involved in this application is of interest to the Bemis Bros. Bag Company?

A. From Omaha to Des Moines and that territory intermediate.

Mr. BOE: That is all.

(Witness excused.)

GEORGE M. CUMMINS was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you give your name and address to the reporter.

A. George M. Cummins; Davenport, Iowa.

Q. What is your business or profession, Mr. Cummins?

A. I am traffic commissioner of the Davenport Traffic Bureau.

Q. And that is what sort of an organization, the Davenport Traffic Bureau?

A. The Davenport Traffic Bureau is incorporated not for profit, and is affiliated with the Davenport Chamber of Commerce.

Q. Has the subject of this application been considered by your Bureau?

255 A. Yes, sir, our committee has considered the matter and authorized me to speak for them.

Q. In support of the application that is now under consideration before the Interstate Commerce Commission?

A. Yes, sir.

Q. So you are appearing here pursuant to official action of the Traffic Bureau of the Chamber of Commerce of Davenport, Iowa?

A. Yes, sir.

Q. How long have you been connected with the Davenport Traffic Bureau?

A. 20 years.

Q. How large a membership does your association have?

A. Our membership is approximately 100. We also serve others who are not members of the Traffic Bureau, but who are members of the Chamber of Commerce, in the matter of getting quotation of freight rates, checking freight bills and giving routings.

Q. Is that Bureau composed of business agencies of one type or another that have occasion to receive and forward shipments, at Davenport, Iowa?

A. Yes, sir, it is composed of receivers and shippers of freight.

Q. And your membership, as I understand, has its interest centered in those who are in and about Davenport, Iowa, is that true?

256 A. That is true.

Q. Were you present, Mr. Cummins, during the giving of testimony of Mr. W. M. Wharton, a previous witness?

A. Yes, I was.

Q. And did you hear the questions asked on direct and cross examination and by the Examiner?

A. Yes, sir.

Q. And if such questions were asked of you at this time, would your answers be substantially the same as those given by Mr. Wharton?

A. Yes, I think so.

Q. Have you anything to add that is peculiar to the city of Davenport within your experience and knowledge, that might be of value to offer to the Commission at this time?

A. Yes, sir, we feel that the public interest will be served by the approval of this transfer now before the Commission. We feel that competition will not be unduly restrained.

Our experience has been similar to the experiences related by others with reference to C.O.D.'s, that seems to be the sore spot with all of us, and also I want to say that there are truck lines operating into and out of Davenport that have a very clean record on C. O. D.'s, nothing to complain of.

Q. And you are including the Keeshin Company in that answer?

A. Yes, sir.

Mr. SHIELDS: Thank you for that.

257. The WITNESS: But the majority we have had complaints of. We have had trouble with certain truck lines—I do not care to mention their names—wherein we have had hard times collecting claims owing other carriers, on account of trouble in collecting from connecting line carriers.

In one instance we had trouble in collecting a five cents per hundred pounds allowance allowed the shipper when he delivers his own freight. That I believe is confined to only one line, and not any of those present here today.

We have also had experience in Davenport by the rail controlled trucking subsidiary in the instance of the Burlington Transportation Company. I might say that our experience with them has been that that railroad through that control has not in any way hampered the full and complete operation of that truck line.

Q. You have found that service satisfactory, have you?

A. Yes, sir, and we have found the Burlington Transportation Company have preserved with full force and vigor the inherent advantages of truck transportation, so far as their operation is concerned. They have published their

rates and held to them irrespective of what the rail rates were, and in the settlement of claims and C.O.D.'s, we have had absolutely no trouble at all.

We want the service continued that is now being furnished by the White Line Motor Freight Company. It is important to us, both to Omaha and to Chicago. Of course, it is not, I believe, before the Commission here insofar as the intrastate operations are concerned.

I might also say, as far as I have personally contacted about twenty of the users of the White Line service that they have authorized me to appear here personally for them and for the application. They are members of the Traffic Bureau.

I believe that so far as reliability and dependability the Rock Island proposed operation of this route will be such that we can support it.

I think that is about all that I have on direct.

Mr. BOE: Thank you, Mr. Cummins.

Exam. HIGGINS: I understand this gentleman, and one other witness—I do not recall his name offhand—appeared in an official capacity as representing their organizations.

Mr. BOE: That is right.

Exam. HIGGINS: But the others were expressing their own personal views?

Mr. BOE: Yes, I think that is true. I think that those who appeared officially for their companies so stated, and those appearing officially for any Chamber of Commerce, so stated.

Exam. HIGGINS: Well, the record will show.

Mr. BOE: Yes, the record, I think, will show that.

Is there any cross examination, Mr. Shields?

259

Mr. SHIELDS: Yes, I have some questions.

#### Cross Examination

Q. (By Mr. SHIELDS) You cited the Burlington service, Mr. Cummins, more or less as an example. Do the Burlington Transportation Company attempt to coordinate their service with the Burlington Railroad?

A. No, I think not.

Q. Do they publish separate tariffs from the railroads?

A. Yes—or, pardon me, are you speaking about the Burlington Railroad?

Q. I am asking if the Burlington Transportation Company, the motor carrier operation, publish separate tariffs from the railroad?

A. Oh, I thought you said by rail.

Q. No.

A. Yes, sir, they do.

Q. And those rate levels, how do they compare with the less than carload rate levels of the railroad?

A. They are lower as far as Davenport is concerned on single line hauls than the rails, and I believe on the joint line hauls they are approximately the rail level.

Q. By the joint line hauls, you mean the hauls between the Burlington Transportation Company and some other agency?

A. And some other truck line, yes.

Q. Some other truck line and not a rail line?

260 A. No, sir.

Q. Now, in view of your statement that they do not attempt to coordinate the two types of service, do you think that would be a comparable example to use in this case?

A. I think it is comparable to the extent of whether or not a railroad owned truck subsidiary would stifle competition or would injure the inherent value to the shipper of truck transportation. That was the thought I had in mind.

It is not, probably, insofar as coordinated service is concerned, no, sir.

Exam. HIGGINS: Off the record just a moment.

(Discussion outside the record.)

Q. (By Mr. SHIELDS) And you also commented on the White Line service. Do you have any complaint as to the service rendered now by the White Line in any respect?

A. Well, now, I think that if I recall my testimony, what I had in mind was the continuation of serving the territory which they now serve. I am perfectly willing to answer that question, yes, sir.

Q. Let me reframe it, then, a little bit differently. Do you anticipate that the White Line service might be curtailed if this acquisition were not approved?

A. Well, from personal knowledge and conversations with those who apparently know, there might be that possibility.

261 Mr. BOE: Pardon me, would you amplify that a little bit? You think there is a possibility that if this application is not approved there might be a curtailment of the White Line service for lack of capital to continue this business?

The WITNESS: Well, yes, for lack of capital, and from my information they have not made the profits out of it that they think they should.

Q. And you think with the addition of the Rock Island support back of it, there may be renewed vigor in the conduct of the White Line business, is that true?

A. We hope so, yes, sir.

Q. Or improvement in service, that is what you expect?

A. Yes.

Q. (By Mr. SHIELDS) To what extent is the Davenport Chamber of Commerce interested in the service between the Tri-Cities, or particularly, Davenport and Chicago, as proposed here?

A. Well, it is one of the lines—or the White Line is one of the lines serving Chicago now, and, as I understand this application, the Rock Island railroad through this acquisition would continue serving Chicago by truck. We do not want to lose that, that is true.

Q. There is other service available between those two points, is there not?

A. Oh, yes.

Q. Do you think the control of the White operations by the Rock Island is necessary in order to maintain that service?

262 A. Well, to the extent that I just mentioned in answer to the previous question, that there is a possibility of losing the White Line service, or a curtailment of it, why, I feel that the Rock Island would be financially able probably to avoid that curtailment of service.

Q. What is the reason for that possibility of curtailment of service? Counsel for the applicant suggested it has limited working capital. Is that the reason you had in mind?

A. Yes, I have no definite personal knowledge of these things except what I have been told, and also the fact that I understand and it has been brought out here this morning, that the White Line is owned by an estate or is controlled by an estate, and there is a desire on the part of that estate to dispose of the White Line properties.

Q. Now, the White Lines have been in operation for quite some time, haven't they?

A. Yes.

Q. They are considered one of the oldest motor carriers in that general territory?

A. Yes, I think they are one of the first, at least west out of Davenport.

Q. And if the operations have been necessary to the public and of sufficient volume, there should not be any need for additional trucks, should there?

Mr. BOE: I think that is getting pretty far afield  
263 from the issues in this case.

Exam. HIGGINS: You have no interest as to their financial position, have you?

Mr. SHIELDS: Except as to what might take place in the way of curtailment if this application was not approved.

Exam. HIGGINS: I think I will let it remain in for what it is worth.

Q. (By Mr. SHIELDS) Do you know anything about the volume of tonnage handled by the White Lines between Davenport and Chicago?

A. No, I have no way of knowing.

Q. Do you know how many pieces of equipment are worked per day?

Mr. BOE: I think I will object to that.

Exam. HIGGINS: I think I will let him answer. Do you know what kind of equipment they have and the number of vehicles?

The WITNESS: No, I don't know the number of vehicles.

Q. (By Mr. SHIELDS) Well, now, you stated you did not want less service, and I will ask you what the service was?

A. Well, I stated in answer to another question on cross examination that the service I had in mind was the territory served.

Mr. BOE: You are familiar to a greater or less extent with the fact that there is service now by White Line between Davenport and Chicago, by the White Line Motor Freight Company?

264 A. The WITNESS: Yes, sir, there is.

Mr. BOE: That is all.

(Witness excused.)

Mr. BOE: T. E. H. SNOW.

T. E. H. SNOW was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Mr. SNOW, will you give your full name and address to the reporter, please?

A. T. E. H. SNOW, Moline, Illinois.

Q. What is your business or occupation?

A. I am employed in the general traffic department of Deere & Company at Moline.

Q. And how long have you been connected with Deere & Company, Mr. SNOW?

A. Over nineteen years.

Q. Has that service been confined to the traffic department of Deere & Company?

A. That is correct. I might add to that that my duties are very largely in the handling of matters pertaining to freight rates and freight rate adjustments, freight rate reductions, and so on.

Q. With all the transportation problems that pertain to Deere & Company?

A. That is right.

265 Q. Now, Deere & Company have a place of business at Moline, Illinois, do they?

A. The general company headquarters are at Moline, and we have three factories in Moline and three factories in East Moline; two of the factories at East Moline ship by rail and truck and other forms of transportation into the territory involved here.

Q. That is, Des Moines and Omaha. Do you have a place of business at Omaha?

A. We do. Perhaps I had better explain our distribution set-up.

In addition to these factories I have mentioned, we have a branch house at Moline that is separate and apart from them, which serves either directly or through sub-branch houses and distributing houses at various points, all of the state of Iowa, except the western four tiers of counties, which are served by our Omaha branch and our Sioux City sub-branch.

We have also a sub-branch of the Moline house at Des Moines, and a similar house at Cedar Rapids. We have a number of what we call transfer houses, small sub-branches, or retail stores, and, of course, dealers scattered around all over the state.

Q. And you are familiar particularly with territory that is involved in this application?

A. I am.

266 Q. Between Chicago and Omaha to the Tri-Cities and Des Moines and the smaller intermediate points?

A. I am, yes, sir.

Q. Now, particularly what type of business is Deere & Company engaged in?

A. Engaged in the manufacture, sale, and distribution of agricultural implements, farm trucks, farm wagons, tractors, and other kindred articles of farm equipment.

Q. In the conduct of that business, does Deere & Company utilize both rail and motor carrier service?

A. We do.

Q. Were you present during the giving of the testimony of Mr. W. M. Wharton and did you hear that testimony, Mr. Snow?

A. Considerable, but not all of it.

Q. Were you present when I asked Mr. Wharton questions respecting the provisions of Section 213, in regard to the use by a railroad company directly or indirectly of motor carrier service in its operation?

A. I believe I was.

Q. And did you hear the questions of the Examiner, and on cross examination, with respect to that aspect of Mr. Wharton's testimony? A. I did, yes.

Q. And dealing also with the question of any possible undue restraint of competition should the acquisition herein be authorized by the Commission?

A. Yes.

Q. Now, if those same questions were asked you, either on direct or cross examination, or by the Examiner, as were asked of Mr. Wharton on those points, would your answers be substantially the same as those given by Mr. Wharton?

A. I believe they would, yes.

Q. Have you anything to add to what you have already testified to that is peculiar to Deere & Company from your experience in traffic matters?

A. Yes, I have a few things.

I might say, that we have been using White Line service out of Moline and East Moline for the past several years, practically speaking ever since it was first established. We are using that service quite regularly on our L.C.L.—what would ordinarily be L.C.L. freight shipments—to points such as Des Moines, Cedar Rapids and Omaha, and Iowa City, all of which are reached by White Line direct, and also to some other points such as Algona, Emmetsburg, Fort Dodge and Sioux City, where we are using White Line in connection with one or more connecting lines out of Des Moines. Those are some of the principal points that I know of, where there are fairly regular shipments.

In addition to that, there are a number of shipments that move over White Line to our dealers at intermediate points along the line, or to points reached by connecting truck lines out of Des Moines.

Q. So that in addition to using the service of White Line Motor Freight Company to points reached by

it, you use that service in connection with your connecting motor carriers to the points that you specifically named?

A. Yes, sir, and we want to continue doing it.

Mr. BOE: That is all, Mr. Snow.

Q. (By Exam. HIGGINS) What proportion of your traffic moves by truck, principally inbound, or both?

A. Well, we have both inbound and outbound by truck, Mr. Examiner. That is a pretty hard question to answer, because our big volume both in and outbound is by rail in carload quantities, but we do have in the course of a year's business a substantial tonnage of L.C.L. or truck shipments, and of traffic that would ordinarily move as what we term L.C.L. freight effective in truck service, for instance, but a very large portion of that, probably the larger portion of that, is moved by truck.

Q. I am wondering what a previous witness meant when he said that the larger type did not lend itself very readily to a movement by truck.

A. Well, that is only true with respect to a very limited number of instruments. Some of them, large articles like threshers and certain combines, do not, but outside of that most of them can be and are shipped by truck, tractors, the general line of implements, wagons, and so on.

269 Q. Are there a good many of your distributors in this territory?

A. Oh, yes. Yes, our distribution in that territory is pretty well diffused.

Q. (By Mr. BOE) Because of the nature of the business, that extends to many of the smaller towns that are intermediate to the Tri-Cities and Des Moines and Des Moines and Omaha, is that not true?

A. Oh, that is true, yes, sir.

Q. (By Exam. HIGGINS) Have any of those distributors at these intermediate points communicated to that they would be better served by coordinated rail-truck movement?

A. I don't know that that is true. I am unable to say whether we have had any such representation. However, it is our idea that it would be.

Q. (By Mr. BOE) Based upon your experience, would such things as earlier arrivals at destination, later departures from your place of business, be of benefit and advantage to your customers?

A. It would certainly be of benefit all around, Mr. Boe. However, in this particular situation we do not anticipate an improvement in that respect, so much as we are thinking

about the factor of increased stability and retention of this White Line service which has been generally so satisfactory. Along the line of what Mr. Cummins said 270 when he was on the stand. I know that we have had recurrent rumors of, in plain English, a shocking financial condition on the part of the White Line, which has caused us some concern at times. That condition we feel would be removed by this acquisition. We also feel that there would be some opportunity of economy and increased efficiency by combining the terminal facilities of the two carriers, terminal and intermediate station facilities, and so on; and another possible avenue of benefit to us is the fact that our plants generally were built for rail transportation in carload quantities. Our facilities for loading and unloading trucks are quite limited.

We operate a considerable fleet of trucks, as we handle the hauling around and between our plants at Moline and East Moline. The congestion of those facilities is quite a problem. It would help some, undoubtedly, to be able to combine truck-rail operations to the extent that it would be possible under this arrangement, with our L.C.L. freight pick-ups going out over the Rock Island.

Q. So that you think this proposed acquisition would result in an improvement in service, both by truck and by rail carrier?

A. We feel that it would be in that it would at least stabilize and preserve the service that we have there.

Q. Such conditions as now exist or might be improved upon, both by rail service and by highway service? 271 A. That is right.

Q. Are you appearing officially for Deere & Company at this time, Mr. Snow?

A. Yes, I am.

Q. You are uttering not only your own personal views, but you are authorized to speak officially for Deere & Company insofar as its public interests are involved in this proceeding?

A. Yes, sir, I am.

Mr. BOE: Thank you.

Exam. HIGGINS: That is all.

(Witness excused.)

H. F. SUNDBERG was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) You are Mr. H. F. Sundberg and you have your residence at Cedar Rapids, Iowa, do you?

A. Yes, sir.

Q. Mr. Sundberg, what is your business or profession?

A. I am manager of the Chamber of Commerce, Traffic Bureau, of Cedar Rapids, Iowa.

Q. And you are a licensed practitioner before the Interstate Commerce Commission?

A. I am, yes, sir.

Q. How long have you been manager of the Traffic Bureau of the Chamber of Commerce of Cedar Rapids?

272 A. About twenty-eight years.

Q. And I take it your peculiar connection with that institution is as to traffic and transportation matters, is that true?

A. That is right.

Q. Now, how large an organization, and I mean in the way of membership, is the Cedar Rapids Chamber of Commerce, Mr. Sundberg?

A. We have approximately 700 members, and among that number there are probably 150 shippers or shipper organizations.

Q. From what territory do you draw your membership, Cedar Rapids and its environs?

A. Practically all Cedar Rapids.

Q. Practically all Cedar Rapids?

A. Yes.

Q. And the shippers that are members of your organization are shippers of various types of commodities, I take it, is that true?

A. Yes, jobbing and manufacturing.

Q. Now, I will ask you, Mr. Sundberg, if you were present during the giving of testimony by a previous witness named W. M. Wharton?

A. I am sorry, I was not.

Q. You were not here?

A. No.

273 Q. Then I would like to ask you this, and I will preface my question by saying that this is an application by the Rock Island Motor Transit Company, a wholly owned subsidiary of The Chicago, Rock Island & Pacific Railway Company, to acquire certain operating rights and properties of White Line Motor Freight Company and White Line Trucking Company, and I will direct your attention to a map that is attached as Exhibit B-7-(f) to the application filed in this case, which outlines in green the routes of the White Line Motor Freight Company and

the White Line Trucking Company that are involved in this proceeding. In addition, it shows in black the lines of the railroad of The Chicago, Rock Island & Pacific Railway Company.

Now, directing your attention, Mr. Sundberg, to the clauses of Section 213 of the Federal Motor Carrier Act, first as to transactions by a person concerning the acquisition of a motor carrier, and particularly whether such acquisition would promote the public interest by enabling a railroad company to use service by motor carrier to public advantage in its operations, do you have an opinion as to whether or not an acquisition such as is proposed here would promote the public interest by enabling a railroad company to establish motor carrier service to public advantage in its operation?

A. Yes, I have studied this application, and am here to endorse it, believing that it would be in the public interest.

Q. Now, what are your reasons for that conclusion  
274 and opinion, Mr. Sundberg?

A. Well, I have been associated with this organization for many years, and during those years it has been one of my duties to obtain the best service possible, principally because we have many millions of dollars invested in the jobbing business in Cedar Rapids, and in order to protect our territory we must have good service.

I might say, years ago we had daily rail service along this line between Davenport and Omaha. Then as time went on we found it was diminishing, the reason being, of course, inroads made by trucking operations of several kinds, one of them being the private truck, that is, the truck operated by certain wholesalers; and another reason being the customer's truck, who was willing to come in and get his goods; and then the common carrier truck.

It has been our position and we have followed it out, that we would not promote or endorse trucking operations except in instances where we had to protect our trade territory, and it happens in this case of the White Line we approved their operations for that reason. Competing cities used truck service to their customers, and we found it necessary to seek the same kind of service.

Now, that the Rock Island Transit Company which is practically the Rock Island Railway—

Q. A wholly owned subsidiary.

275 A. A wholly owned subsidiary, appears willing to take over that operation and protect our jobbing interests we are perfectly willing to go along with them.

I might say that the White Line operation has been very satisfactory to Cedar Rapids.

Q. In stating the conclusion that you have stated, you took account, I take it, of the fact that the experience of the Rock Island railroad extending over a period of approximately seventy years in this territory, might lend itself to advantage to the control and operation of the motor carrier service?

A. Yes, I believe I can see many features connected therewith.

Q. Could you mention some of those facilities?

A. Well, the facilities, for instance, at the terminals and along the road, that is depot facilities and agent—

Q. That are not now available to the White Line Motor Freight Company and White Line Trucking Company?

A. That is true, and the agents in most of those towns that we get in contact with with reference to the transportation service, and there is the telegraph and telephone service that will be available, which is very desirable in tracing freight and in dispatching the equipment. I think all of those things lend themselves to economical operation.

Q. And those things, of course, having direct relationship to the establishment and stability of reasonable freight rates, have they not, both with respect to freight service and motor carrier service?

A. Yes, and I believe I should say, too, we feel strongly that all of these distribution services should be in the hands of carriers that are under state and federal regulations.

Q. Do you think that insofar as supervision of the transportation service is concerned, such departments as the railroad maintains, and their freight claim department of the railroad, with the experience they have had over a period of years, might be of value in establishing efficient transportation service by motor carrier?

A. Yes, I think based on this experience of railroads they are very strong in that respect, and I believe they would be a protection in this case.

Q. With resulting advantage to the shipping public?

A. Yes, sir.

Q. Now, I want to direct your attention to another aspect of this application, Mr. Sundberg, and that is with regard to Section 213 of the Motor Carrier Act, insofar as it refers to undue restraint of competition, should a railroad acquire a motor carrier. I want to ask you whether

you have an opinion as to whether there would be an undue restraint of competition, should this acquisition be consummated? A. I would say absolutely not.

Q. And upon what factors do you predicate that opinion, Mr. Sundberg?

277. A. Because the competing railroads and competing truck lines would still be in existence as they are today.

Q. Could you give some illustrations as to what existing railroads are competitive with the Rock Island to some of these points?

A. Yes. Cedar Rapids to Des Moines, for example, the Chicago & North Western Railway, Chicago, Milwaukee, St. Paul & Pacific, both have direct lines to Des Moines, and in addition we have the Nation Freight Lines operating truck service.

Q. Now, between Chicago and Cedar Rapids, Iowa, you have several other railroads competing with the Rock Island for transportation service between those points, haven't you?

A. Yes, we have several routes.

Q. And between Cedar Rapids and Omaha and Council Bluffs?

A. Yes, that is true.

Q. So you think so far as motor carrier service or railroad carrier service is concerned, this acquisition would result in no undue restraint of competition, is that true?

A. If I believed otherwise I would be opposing it here, but I do not believe that is true.

Q. Are you appearing here for the Chamber of Commerce of Cedar Rapids, Mr. Sundberg?

A. Yes, sir.

Q. Has this application been the subject of official consideration by your board of directors?

278. A. Not specifically. I have some blanket authority of action.

Q. Will you please relate in what manner you are authorized to appear here?

A. Well, I have quite a wide blanket authority to give myself on this question. In other words, the board of directors seem to have placed considerable confidence in my judgment, and it is only matters of very special concern that would come before them for a ruling. I have discussed the matter with our executive secretary, Mr. A. L. Taylor, and he concurs in my views as I have stated them.

Q. Would it be proper to say that the Chamber of Commerce of Cedar Rapids, Iowa, appears here in support of this application?

A. Yes, sir.

Mr. BOE: That is all.

Cross Examination.

Q. (By Mr. SHIELDS) To what extent is the Cedar Rapids Chamber of Commerce interested in service between the Tri-Cities and Chicago?

A. Well, as to business originating in the Tri-Cities destined to Chicago, our only interest would be the matter of competition with our shippers, whatever that might be.

Q. It would not be particularly concerned over service between those two points, would it?

A. I do not believe we would be concerned about that now. We have excellent service from Cedar Rapids to Chicago.

Q. Is not your interest here principally as to intrastate service in the State of Iowa?

A. Yes, the major interest would be intrastate.

Mr. SHIELDS: That is all.

Mr. BOE: But it is not confined exclusively to intrastate?

The WITNESS: Oh, no.

Mr. BOE: It also involves interstate?

The WITNESS: Traffic to Illinois and traffic to Omaha.

Mr. BOE: That is all. Thank you, Mr. Sundberg.

(Witness excused.)

E. C. GRAVES WAS SWORN and testified as follows:

Direct Examination.

The WITNESS: My name is E. C. Graves, and I am traffic manager, Brown-Camp Hardware Company, Des Moines, Iowa.

Exam. HIGGINS: What are your initials, Mr. Graves?

The WITNESS: E. C. Graves.

Q. (By Mr. BOE) Mr. Graves, what is your business or occupation?

A. Traffic manager for the Brown-Camp Hardware Company, Des Moines, Iowa.

Q. And how long have you been connected with the Brown-Camp Hardware Company?

A. 30 years past.

Q. In what capacity are you employed by that company?

A. Traffic manager.

Q. Has the principal part of your connection with the Brown-Camp Hardware Company been related to transportation matters? A. Nearly altogether, yes.

Q. And in what business is the Brown-Camp Hardware Company engaged?

A. Wholesale hardware distribution.

Q. In the conduct of that business does the Brown-Camp Hardware Company receive and forward shipments of freight? A. Yes, sir.

Q. Were you present, Mr. Graves, when Mr. W. M. Wharton appeared as a witness here today?

A. Part of his testimony I heard.

Q. Did you hear the questions that were asked him with respect to various provisions of Section 213 of the Motor Carrier Act that dealt with promoting the public interest by enabling a railroad company to use motor carrier service to public advantage?

A. The same as Mr. Sundberg, yes.

Q. You heard those questions?

A. Yes.

Q. To the same extent that Mr. Sundberg did?

A. Yes, sir.

281 Q. You were present during the entire testimony of Mr. Sundberg, were you?

A. Yes, I was.

Q. Both the direct, cross examination and such other questions as were asked him?

A. Yes, sir.

Q. Now, if those questions that you have heard directed to Mr. Wharton as related to the various clauses of Section 213 of the Motor Carrier Act, and if those questions asked of Mr. Sundberg were asked of you, would your answers be substantially the same as those that were given by Mr. Wharton?

A. Yes, sir; they would.

Q. Have you anything to add in addition to the answers already given by you, that is peculiar to your own knowledge of your connection with the Brown-Camp Hardware Company?

A. Personally, I think it is a great advantage; that is quoting from our good friend Mr. Sargent.

Q. And Mr. Sargent is president of the Chicago & North Western Railway Company?

A. That is right. I do think that the reliability, that is, the assets of the Rock Island Railway behind this matter would be of tremendous importance to us in making it wholly financially reliable.

Mr. BOE: That is all, Mr. Graves.

282 Q. (By Exam. HIGGINS) Does your company now patronize the White Line Motor Freight Company, and the Rock Island Railway?

A. They do.

Q. Is it your opinion that if the control of White Line Motor Freight Company were under the direct supervision and direction of the Rock Island railroad or a subsidiary, that improvement in service could be looked for through a truck-rail operation?

A. It is, and I will tell you just one little reason, and that is because of that I think it would mean better delivery in these intermediate points. I think that quick delivery could be effected, in that event.

Q. Do you mean early morning delivery?

A. Yes, early morning delivery. That is selfishly speaking, perhaps.

#### Cross Examination.

Q. (By Mr. SHIELDS) Do you have that early morning delivery now?

A. Not altogether, no, sir, considerable afternoon delivery.

Q. How would this acquisition change that?

A. Because, as I figure it, and I have gone into it, I figure that it will be principally in the west end with those small towns, it will be in the depot at seven o'clock or perhaps earlier.

Q. Is that intrastate you are speaking of now?

A. Intrastate, yes.

283 Q. Did you ever file a complaint or consider filing a complaint with the Iowa Commission as to the existing service—

A. How is that?

Q. Did you ever file a complaint or consider filing a complaint with the Iowa Commission as to the existing service not being sufficient?

A. Well, we often trace shipments, and suggest and recommend, but we have never filed a complaint that I know of. I do not remember or I do not recall filing a complaint against any of the present transportation facilities of the White line, or the Rock Island.

Q. Do you have any definite knowledge of your own as to the financial condition of the White Line?

A. As to the financial condition?

Q. Yes, as to the financial condition of the White Line.

A. No, I do not.

Mr. SHIELDS: That is all.

(Witness excused.)

JOHN H. GILLESPIE was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) I will ask you to give your name and address.

A. John H. Gillespie, Des Moines, Iowa.

Q. What is your business or profession?

A. I am associated with the Iowa State Commerce  
284 Commission as assistant secretary and special examiner. My work consists of charge of what we call the Interstate Motor Division, of our Commission.

Q. How long have you been connected with the Iowa Railroad Commission?

A. Seventeen years.

Q. And since the enactment of the Federal Motor Carrier Act, has it been among your duties to consider that Act in connection with Motor carrier operations, insofar as the State of Iowa is concerned?

A. It has.

Q. I want to show you, Mr. Gillespie, a document marked for identification Applicant's Exhibit No. 2, and I will ask you as to what that is, if you know?

A. That is a list prepared by the Iowa State Commerce Commission of the common carriers who have been authorized by the Iowa Commission to operate as interstate carriers. The list is rather up to date, going up to November 16, 1937.

Q. I notice in this exhibit some red lines on the various pages thereof; can you explain them, Mr. Gillespie?

A. The carriers which are underscored with red crayon are carriers who have been authorized either to operate the whole distance of U. S. Highway No. 6, running easterly and westerly across Iowa from Davenport to Council Bluffs, or  
285 carriers who have been authorized to serve portions of that highway, Highway No. 6 being the state highway which the White Line is authorized to serve within the State of Iowa.

Q. And when you use the word "carriers" you have reference to motor carriers?

A. That is right.

Q. And that term does not include rail carriers?

A. That is correct.

Q. Did you place these red lines on this exhibit, Mr. Gillespie, or have it done?

A. It was done under my direction.

Q. And you have examined it to verify that it is correct insofar as it is a reflection of the records of the Iowa Railroad Commission, and insofar as your personal knowledge extends, is that correct?

A. I believe it is correct, yes, sir.

Mr. BOE: I now offer Applicant's Exhibit No. 2 in evidence.

Exam. HIGGINS: Any objection?

(No response.)

Exam. HIGGINS: The exhibit just identified by Mr. Gillespie will be received in evidence as Applicant's Exhibit No. 2.

(Applicant's Exhibit 2, Witness Gillespie, received in evidence.)

Mr. BOE: That is all, Mr. Gillespie.

Exam. HIGGINS: The record will show that it consists of thirty sheets, with a certificate of the Secretary of the Iowa State Commerce Commission, all bound together as one document.

Cross Examination.

Q. (By Mr. SHIELDS) Mr. Gillespie, this list of carriers contained in this Exhibit No. 2, have you set out in that exhibit in every case the exact routes followed by the respective carriers?

A. Well, I don't know just what you mean by "exact route". For instance, between two points—

Q. As far as the records of the Commission are concerned.

A. The records of the Commission have these routes described very accurately. However, this list merely shows the terminal points which are authorized.

Mr. BOE: And the routes over which the operations are conducted?

The WITNESS: Yes.

Q. (By Mr. SHIELDS) That is my question, does this exhibit correctly set out the routes that the various carriers follow?

A. Yes, it does.

Q. And does it in any way indicate the points along these routes that the respective carriers serve on an interstate basis?

A. The intermediate points are not set out. However, I know of no restrictions which have been placed by  
287 our Commission, so far as interstate operations are concerned, to any point.

Q. Does this exhibit, so far as you are acquainted with it, in any way purport to establish whether these various carriers do or do not have authority under the Federal Act?

A. No, it does not. It is merely a list of carriers who have been authorized by the Iowa Commission. It does not purport to show what authority has been given these carriers by the Federal Commission.

Q. Are these all common carriers?

A. Yes.

Q. Are any of them contract carriers?

A. No.

Q. Do any of these carriers also hold themselves out to be contract carriers?

A. I might clarify that last answer of mine. They are all common carriers, and some of these same carriers may be contract carriers as well.

Q. That is true in the case of the White Lines, is it not?

A. I believe that is correct, and several others. However, all the carriers listed here are common carriers.

Q. Some of them may also be contract carriers?

A. That is right. We have no jurisdiction over contract carriers, and for that reason we have no record of contract carriers.

Q. Then, you would also admit that some of them  
288 might be contract carriers under the Federal Act?

A. That might possibly be.

Mr. SHIELDS: I believe that is all.

#### Re-direct Examination.

Q. (By Mr. BOE) Mr. Gillespie, just one additional question on the subject of contract carriers, so far as you know there may be and are contract carriers operating over some of these routes that you have underscored in red pencil, that are not listed in this exhibit?

A. Yes, I know of a good many instances where there are.

Q. So that this exhibit is primarily to be offered for the

purpose of showing interstate motor carriers as that term is understood and used by the Iowa Railroad Commission, is that true?

A. That is right.

Exam. HIGGINS: Operating West of Davenport?

Mr. BOE: Operating within the State of Iowa.

Exam. HIGGINS: Operating west of Davenport over the same routes here involved?

Mr. BOE: That is right.

Exam. HIGGINS: Over the same routes here involved, or to the same territory?

Mr. BOE: That is right.

The WITNESS: The routes have been underscored.

Exam. HIGGINS: The routes between Davenport  
289 and Omaha of the White Lines are designated as U. S. Highways 6, and 109.

Mr. BOE: U. S. Highway 6 I think is the proper designation.

The WITNESS: The only designation I know of the White Line Motor Freight is U. S. Highway No. 6; that is, between Council Bluffs and Des Moines, and from Des Moines west.

Q. (By Mr. BOE) Does Highway 109 refer to the short segment that extends to Oxford, Iowa, Mr. Gillespie?

A. I do not seem to find a reference to that.

Mr. BOE: I think the Examiner is referring to the map.

Exam. HIGGINS: Yes. It sets forth its principal highway as Highway No. 6 between Davenport and Omaha.

The WITNESS: Yes, with two exceptions, and that is between Iowa City and Cedar Rapids—

Mr. BOE: Yes.

Exam. HIGGINS: And your exhibit shows there are other operators over that route in whole or in part, without anything to show which.

Mr. BOE: Yes, that is right. If you want to find out the highway numbers he could name them. Can you answer that question, Mr. Gillespie?

The WITNESS: The exhibit shows there are forty carriers authorized to serve all or portions of Highway No. 6 and the two segments also involved in this proceeding.

Exam. HIGGINS: That is Cedar Rapids and Muscatine?

290 The WITNESS: Yes, that is right.

Exam. HIGGINS: All right, proceed.

## Recross Examination.

Q. (By Mr. SHIELDS) The purpose of this exhibit was not explained on the record, but I understood it is for the purpose of showing the extent of the competition. Now, may I ask Mr. Gillespie whether he knows of his own knowledge that these various carriers he has underscored in red are now in operation and in business?

A. I know of my own knowledge that they have been authorized and in a good many cases I know that they are in operation by reason of the fact that they are paying to Iowa monthly road taxes for the use of the highways, and it is not very likely that we would be getting the tax if they were not operating.

Mr. BOE: And that is all of recent date, Mr. Gillespie?

The WITNESS: That is as of November 16.

Mr. BOE: 1937?

The WITNESS: Correct.

Q. (By Mr. SHIELDS) Now, can you state to the Examiner whether the Shippers Dispatch, Incorporated, which you have underlined in red on page 25, are in operation or not?

A. I cannot say of my own knowledge that they are. However, they are still authorized to operate so far as Iowa is concerned.

Q. Are they paying a monthly road tax to Iowa?

291 A. I cannot say as to that.

Q. Have they paid their last mileage tax?

A. I have no way of answering that.

Q. I understood you to say you could determine whether they are operating or not by whether they pay their mileage tax.

A. Well, I have not checked that particular carrier.

Q. Have you checked every other carrier you have underlined?

A. No, I have not.

Q. Are you in a position to state the extent of service of the various carriers you have underscored, over these routes?

A. No, not offhand.

Q. It might possibly be their service is periodic and quite occasional, might it not?

A. In many instances that is quite probable.

Exam. HIGGINS: Have the Iowa Commission any other way of determining whether carriers to whom it has issued certificates continue in operation under those certificates, other than through payment of the road tax?

The WITNESS: Only through a systematic method of highway checks, which we conduct at various points in the state.

Q. (By Exam. HIGGINS) Are you familiar with that?

A. Well, in a measure.

Q. Aside from the other named carriers who claim to operate, in Exhibit No. 2, have you any personal actual knowledge of any other motor carriers who operate over these routes or any part thereof?

A. Yes.

Q. So you have some personal knowledge that there are other operators over the routes between Davenport and Omaha, in whole or in part, irrespective of the official records of the Commission?

A. That's right.

Q. Are they few or many?

A. They are a great majority of those underscored here. If there are any of those carriers who have abandoned service, they are very few. There are perhaps not over half a dozen at the outside.

Q. (By Mr. SHIELDS) You would not say that this information contained in Exhibit No. 2 sets up any particular line of service, would you?

A. No.

Q. Whether it be great or small?

A. No, I did not mean to infer that by that exhibit.

Q. And it is quite possible some of these carriers that operate over this Highway No. 6, might merely go through the state and not stop at any points enroute?

A. Yes, that is right. However, they still pay the state a tax.

Q. But it is no reflection of the amount of service performed?

A. None whatever.

293 Mr. SHIELDS: That is all.

Mr. BOE: Thank you, Mr. Gillespie.

Q. (By Exam. HIGGINS) Do you know of your own personal knowledge whether those go through without serving intermediate points?

A. Other than those listed in this exhibit?

Q. No, some of those included in the exhibit.

A. Oh, yes, I know some of them do, of my own personal knowledge.

Mr. BOE: And is that substantially true as to all points that are located on Highway No. 6 between Davenport and Council Bluffs?

The WITNESS: I think it would apply generally.

Mr. BOE: To your personal knowledge there are common motor carriers or contract carriers serving one or more of those points intermediate between Davenport and Council Bluffs, on Route 6?

The WITNESS: I know that to be a fact.

Exam. HIGGINS: Can you name a few of them just off-hand?

Mr. BOE: Refer to the carriers listed on the exhibit.

The WITNESS: Do you mean the carriers that are listed on the exhibit?

Exam. HIGGINS: Yes, just give a few names that would fall in that category.

The WITNESS: The On Time Transfer Company, 294. Commercial Freight Lines; Brady Transfer & Storage Company; Kenneth C. Headley; Hoey Cartage Company, and Reliable Transit Company; Watson Brothers Transportation Company, and Western Freight Lines.

Q. (By Mr. SHIELDS) Now, take On Time Transfer Company, what points on Route 6 in Iowa do they serve interstate company?

A. They are authorized to serve any points.

Q. Do you know whether they do or not?

A. No, I cannot say that I know they do.

Q. Then, might it not pass freight through the State of Iowa without serving any intermediate point?

A. That is right.

Q. And might that not be true of any of these carriers you named here?

A. Quite true.

Q. Now, the Reliable Transfer Company, do they use Highway 6 or Highway 30?

A. They use portions of Highway 6 and 30.

Q. Which do they use the most of?

A. I think their principal operation is over 30 to Cedar Rapids. However, they have an operation shown on page 22 between Cedar Rapids and Des Moines, using Highway No. 6 up as far as 149, and then north.

Q. May I ask you, Mr. Gillespie, as a matter of information, and I think it should be in the record, as to the provisions of the Iowa law in determining what is a common and a contract carrier in authorizing operation interstate.

Mr. BOE: I think now I am going to object to any discussion about any definition of the common or contract car-

Pier under the Iowa law. I do not think that is pertinent to the issue here. We would get into some questions of law that would complicate the case.

Exam. HIGGINS: How could the Interstate Commerce Commission be interested in that?

Mr. SHIELDS: This exhibit was offered as a list of common carriers operating in the State of Iowa. Now, there might be some discrepancy as to what is a common carrier under the Iowa law as compared with the Federal Act.

Mr. BOE: I think counsel has overlooked the purport of this exhibit, which is as to whether or not these are motor carriers as distinguished from railroads, and if they were common carriers so far as the Iowa law was concerned, and the Interstate law, the interpretation of the Iowa law would control.

Exam. HIGGINS: Assume some of them were contract carriers, they would still be competitors, would they not?

Mr. BOE: Yes.

Exam. HIGGINS: Is not a contract carrier sometime's a very serious competitor?

296 Mr. SHIELDS: Yes.

Exam. HIGGINS: Well, I shall not insist that the witness make any legal definition on the basis of the Iowa law. Are you a lawyer, Mr. Gillespie?

The WITNESS: No, I am not.

Exam. HIGGINS: It might be very difficult even for a lawyer to give such a definition, without any reflection on your legal qualifications, at all.

Mr. SHIELDS: Might not some of these carriers listed here be, so far as the information of the Iowa Commission is concerned, transporting property for just one or two shippers?

Mr. BOE: I think I am going to object to that line of questioning. The extent of the business done by those various motor carriers I do not think is in issue here. The fact that they are operating a motor carrier service over all or a portion of this highway to a more or less greater extent, I think is of material value to this case, and it is for that purpose that this exhibit is offered, but if the question should be carried to its conclusion, as to what extent these various carriers conduct business, it would encumber this record without proving anything and so I am objecting to any questions along that line.

Mr. SHIELDS: I have no further questions.

Exam. HIGGINS: Do you withdraw that question?

Mr. SHIELDS: Yes, I will withdraw it.

297 Mr. SCANLAN: Mr. Gillespie, a number of these witnesses were very much interested in the service, apparently an Iowa State service on this route. I wonder how many of them were authorized?

The WITNESS: Intrastate service?

Mr. SHIELDS: Yes.

Mr. BOE: I object to that. I do not think intrastate service is pertinent here.

Exam. HIGGINS: I think this witness introduced this exhibit to show the extent to which these operations rendered service.

The WITNESS: That is correct.

Exam. HIGGINS: This does not purport to be a list of intrastate operators in Iowa over Highway 6.

Mr. BOE: No, it is not offered for that purpose and I object to the questions as to intrastate service.

Exam. HIGGINS: I think the record does show up to now that you propose to use whatever intrastate rights the White Lines might now have or may acquire in pending applications?

Mr. BOE: That is right.

Exam. HIGGINS: Do you know of your own personal knowledge that there are intrastate operators over these routes?

The WITNESS: Yes. However, if you will permit me to elaborate a little, it has been the policy of the Iowa  
298 Commission not to permit a duplication of service intrastate, and while a number of carriers are authorized to use these highways, I know of no instance where more than one carrier has been authorized to serve the same points intrastate.

Mr. SHIELDS: You explained the purpose of that exhibit and I believe there was a qualifying statement by the witness that it did not purport to indicate any great amount, whether it was a greater or less figure—

Exam. HIGGINS: Do you mean with respect to the schedules?

Mr. SHIELDS: Anything that would tend to show the extent of the service schedules, number of trips, or anything of that kind.

Mr. BOE: I think that is correct.

Exam. HIGGINS: I so understood it.

Mr. BOE: Thank you, Mr. Gillespie.

Exam. HIGGINS: Any further questions?

(No response.)

Exam. HIGGINS: You are excused.

(Witness excused.)

ROY C. DAVIDSON was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you please give your name and address to the reporter.

A. Roy C. Davidson, LaSalle Street Station, Chicago, Illinois.

299 Q. And what is your business or occupation?

A. I am occupying the position of assistant freight traffic manager for the Trustees of The Chicago, Rock Island & Pacific Railway Company.

Q. Are you familiar in a general way with the transaction now before the Interstate Commerce Commission in this proceeding?

A. I am.

Q. How long have you been connected with the traffic department of the trustees of The Chicago, Rock Island & Pacific Railway Company, and that company prior to the filing of its petition to reorganize under Section 77 of the Bankruptcy Act?

A. 33 years.

Q. Has that service been entirely confined to the traffic department, Mr. Davidson?

A. It has, yes.

Q. Showing you a document that is marked for identification Exhibit No. 3, I will ask you if that was prepared by you personally or under your supervision and direction?

A. It was.

Q. From what source was this exhibit prepared?

A. The station records which are maintained each month by the agents at those stations.

Q. From the records kept by the trustees of The Chicago, Rock Island & Pacific Railway Company in the usual and customary course of business, is that right?

300 A. That is right.

Q. Now, what is this exhibit, Mr. Davidson?

A. Well, it shows for the stations and years specified the merchandise in pounds, that is, less than carload freight in pounds, in two classifications, forwarded and received, and shows the trend of the merchandise since 1929.

Below the year 1936 is shown in decimals what the 1936 tonnage is equivalent to in truckloads, or 20,000 pounds for the average truckload.

In the case of Cedar Rapids, for instance, for 1936, the total forwarded business is equivalent to 2.4 truckloads for the year; that is, per day.

On the received business it is 1.8 truckloads per day.

That tonnage or weight is received from all directions of the wind, and likewise under the forwarded column it is destined to all destinations.

Q. In which the Rock Island participated in the transportation, either to destinations reached by its lines or connecting carriers, and to points involved in the territory before the Commission in this case, is that true?

A. That is true.

Q. Have you anything to add with respect to this exhibit that you have not already said?

A. The fact that the weights are accumulated from all directions or to all directions, shows how small the  
301 volume of merchandise received or forwarded at points on the route in this application was for the year 1936.

Q. Now, I will ask you to proceed with your testimony with respect to this application, Mr. Davidson.

A. In connection with the performance of my duties in the freight traffic department of the Rock Island and particularly during the past seven or eight years, my attention has been frequently directed to the fact that L. C. L. tonnage on the railroad has decreased in substantial volume, and the exhibit which will be offered here today gives a vivid recital—

Q. Just at that point, may I direct your attention to Exhibit No. 3, is that the one you are referring to in your answer?

A. That is the one, yes, sir.

Q. Proceed.

A. The exhibit which will be offered here today gives a vivid recital of such reductions in the territory which is involved in this application.

Various reasons have been assigned from time to time as to the causes for the reduction in such tonnage. In my opinion there are two primary causes, namely, those traceable to economic conditions and those traceable to diversions of traffic to the trucks. What proportion of the reductions shown in our exhibits on this class of traffic is assignable to either cause, of course, we have no way of determining. There is an index, however, which in  
301A my opinion has a relationship to this question. Our carload business has not fallen off to the extent that the L. C. L. business has fallen off and during the last two years when there has been an upward trend it has been

strikingly noticeable that the earload tonnage has increased in greater volume than the L. C. L. tonnage. I therefore feel safe in offering the opinion that the cause of the major loss of L. C. L. tonnage is the diversion of such tonnage to the competing highway carriers.

The diversion of traffic from the rails to the highways, it seems to me, had its origin in two principal factors, that is, rates and service. It needs no supporting evidence from me to show that traffic was attracted to the highway carriers because of a very general practice of highway carriers quoting rates substantially less than the established rail rates. Included in this factor were such elements as, less rigid packing and crating requirements, compared with those contained in the classification of the railroads. The factor concerning service also contributed largely in this diversion, particularly in so far as it is related to hauls for shorter distances, although I would not wish to be understood as claiming that the factor of service was limited entirely to short hauls. I recognize, so far as my own observation and experience extends, that in many cases the service by highway carriers has been superior to that afforded by the railroads. On this point the privilege of pick-up and delivery, or so-called store door

302 service, was seen to be a type of service strongly desired by the shippers. Also, it has been claimed that by the use of highway service, occasion for transferring or handling shipments in transit has been less frequent as compared with the necessity for transfer one or more times in transit when moving in rail service.

With the advent of federal regulation of motor carriers, in August of 1935, some stabilization resulted in so far as rates and classifications observed by motor carriers are concerned, and with the inauguration of pick-up and delivery service rather generally by the railroads, which arrangement is in effect in the territory involved in this application, an improved rail service has been afforded. However, the furnishing of a comprehensive and satisfactory transportation service by the railroads cannot, in my opinion, be accomplished unless greater use of motor carrier service is availed of by the railroads. It seems to me that the proposal by the Rock Island Motor Transit Company to acquire the operating rights and properties of the White Line companies is not only in the public interest, but will be of substantial advantage to the rail service provided by the trustees of the Rock Island.

It is my opinion, taking into consideration the provisions of Section 213 of the Motor Carrier Act, that the trustees of the Rock Island can use motor carrier service to public advantage in their operations and that

303 such operations will promote the public interest. Some of the considerations upon which this opinion is predicated are:

The establishment of a coordinated service, that is, where transportation is conducted partly by rail and partly by truck, allowing an improvement in schedules by reducing the time in transit for shipments, enabling later departures from point of origin and affording earlier arrivals and deliveries at destinations.

Let me cite some typical examples of where there might be an improvement in service:

Less carload freight from Chicago to certain eastern Iowa points is handled in a car billed to Iowa City, Iowa, and from that point handled east or west bound on locals for distribution. Tri-weekly local freight service is operated between Silvis, Illinois, and Marengo, Iowa; on Mondays, Wednesdays and Fridays the local operates west bound, and on Tuesdays, Thursdays and Saturdays operates east bound. On alternate days a delay of 24 hours occurs at Iowa City.

This service works out as follows:

To Durant, Iowa:

Arrival ..... 1:15 P. M.—third day.

Through time ..... 39 hours 30 minutes,

whereas with coordinated rail-truck service,—rail to Silvis and truck for the 29 miles beyond to destination, it is my opinion an arrival about 11:30 A. M. on the second day with through time in transit approximating 13 hours 45 minutes would result, meaning a saving of about 24 hours.

304 To West Liberty, Iowa:

Arrival ..... 11:45 A. M. third day.

Through time ..... 38 hours,

whereas with coordinated rail-truck service using rail to Silvis, and truck for the 49 miles beyond to destination, I believe an arrival about 12:35 P. M. second day—through time in transit approximating 15 hours could be maintained, meaning about 24 hours shorter time.

To Tiffin, Iowa:

Arrival ..... 1:20 P. M. third day

Through time ..... 39 hours 35 minutes,

whereas with coordinated rail-truck service,—using rail to Silvis and truck for the 72 miles beyond, my opinion is an arrival at 1:45 P. M. second day with 16 hours through time would result, also making a saving of one day.

To Marengo, Iowa:

Arrival ..... 3:00 P. M.—third day.

Through time ..... 41 hours 15 minutes, whereas coordinated rail-truck service via Silvis using truck for the 95 miles beyond would save one day in transit, enabling an arrival at destination at about 3:45 P. M. second day with through time of 18 hours.

Less carload freight from Chicago to points between Des Moines and Wiota, Iowa, is loaded in car for Des Moines and on Mondays, Wednesdays and Fridays moves 305 Des Moines in west bound local for points west of Des Moines to Wiota, Iowa. The through time from Chicago ranges from 33 hours 15 minutes to 40 hours and 40 minutes dependent upon the destination. The use of coordinated rail-truck service to this territory would afford earlier arrivals and delivery to patrons.

These examples are only illustrative of the possibilities of using motor carrier service to advantage.

Station-to-station service entirely by truck should also be provided where it is indicated that such service will be superior to all rail service. In this case I have in mind the possibilities of supplementing rail service from origin points like Rock Island or Moline, Illinois, for smaller destinations, such as Wilton Junction, or Oxford, Iowa. These hauls involve relatively small distances. If the service is restricted to rail or partly to rail and truck it does not seem to me that it will satisfy requirements or enable the performance of the best service. In such instances it is obvious that the station-to-station service entirely by truck would be superior and more economical than the rail service.

Trains may be speeded up by having them haul merchandise tonnage to key points at which it will be transferred to trucks for distribution to the smaller local stations.

If coordinated service were established it would be possible to effect operating economies in the rail service without sacrifice of the shippers' interests. Unprofit- 306 able and uneconomical train operations could be eliminated. To what extent such economies could be effected with respect to the route of the Rock Island between Chicago and Omaha through the Tri-Cities and Des Moines, I am not at this time prepared to say.

In so far as the rate aspect of this transaction is concerned, three distinct types of service occur to me, namely:

1. It would be proper to operate as a highway carrier subject to regulation, at rates and charges comparable to those observed by highway competitors.

2. So-called rail-truck coordinated service which would be performed at rail rates with the pick-up and delivery service and such privileges as are now available under the published rail schedules.

3. A service at the carrier's option which would enable substitution of truck service for complete rail service, at rail rates, with pick-up and delivery service and such privileges as now are available under published rail schedules.

I do not believe that it is improper to mention the fact that competition in its broad sense is faced by the Rock Island from competing lines of railroad which have adapted motor carrier service. At some competitive points in Rock Island territory both highway and rail service is offered by the Burlington railroad and its motor subsidiaries. This is likewise true in the Missouri and Kansas

territory in which competition comes from the Missouri Pacific and Santa Fe railroads. Broadly speaking, I subscribe to the policies adopted by those

companies in utilizing motor carrier service. The efforts of the carriers including the Rock Island, in the past several years, to accord shippers via rail like service to that accorded by motor carriers, by reduction in rail rates and the establishment of pick-up and delivery service in connection therewith, have not been generally successful. It seems to me that in order to afford to the public the maximum of efficient service the Rock Island should be permitted to offer service comparable to its rail competitors.

It seems to me further that the specific acquisition here under consideration lends itself favorably to a step in this direction. Not only may the railroad be afforded an opportunity to develop motor carrier transportation to a higher degree of efficiency than now exists, but the opportunity will be afforded of retaining what L. C. L. tonnage is now enjoyed in addition to that which may be attracted by the service provided by this broader service.

Such control and operation of motor carrier service, it seems to me, obviously is in the public interest and consistent with that part of Section 213 of the Motor Carrier Act relative to the use by a railroad of motor carrier service to public advantage.

In so far as that portion of Section 213 relates to undue restraint of competition, I want briefly to refer to this aspect of the case. An exhibit offered in evidence  
 308 here shows that there are numerous other motor carriers operating in this territory more or less directly competitive with the service provided by the White Line companies. In so far as I am advised, such motor carrier competitors, with one or two possible exceptions, are in no way affiliated with another railroad.

In addition, competition comes to the Rock Island railroad between Chicago, Illinois, and Omaha, Nebraska, from such railroads as the Milwaukee, the North Western, the Illinois Central, the Chicago Great Western, the Wabash, and the Chicago, Burlington & Quincy. These railroads all have direct lines of railroad between Chicago and Omaha. All of them, with the exception of the Burlington, Chicago Great Western and Wabash, serve Cedar Rapids. The Burlington, Milwaukee and Rock Island serve the Tri-Cities. All of them except the Illinois Central serve Des Moines. In the case of the Illinois Central, it maintains joint through rates in connection with other carriers to or from Des Moines. All of the railroads which I have named serve Council Bluffs and Omaha. At Muscatine the rail service of the Rock Island is competitive with that of the Milwaukee.

In view of this elaborate table of competition coming from highway carriers and rail carriers, I cannot see that there would be any undue restraint of competition. Bearing in mind that the Motor Carrier Act, 1935, con-  
 309 fers broad powers upon the Interstate Commerce Commission with respect to rates and practice of carriers, both motor and rail, there would seem to be no support to any contention that the proposed acquisition would in any respect be inconsistent with the inhibitions of Section 213 of the Motor Carrier Act.

At substantially all of the stations on the line of the Rock Island railroad between Chicago and Omaha the railroad maintains facilities for the receipt and delivery of freight in order to prevent theft and provide protection from rain, heat or cold. Where practicable, such facilities could be utilized in the motor freight service. At some points, such facilities are not now used to capacity. Surplus space and facilities would be available and would permit increased and economical use of facilities. Furthermore, existing rail personnel, such as agents, freight

handlers, policing agents, solicitors and accounting and supervisory forces would be available to promote the efficient transaction of business.

Sight should not be lost of the value of the uniform bill of lading now in general use upon the railroads. Shipments moving in any coordinated service would enjoy the advantage of the uniform bill of lading. Shipments could be forwarded to or from points on connecting lines at all stations served by railroads in the United States.

C. O. D. shipments moving entirely by truck with the integrity of the Rock Island to support them would also constitute a further privilege which is now sparingly exercised by many shippers, so I am informed, because of losses sustained or unpleasant experiences with irresponsible motor carriers. I believe I may safely say that shippers have been fairly dealt with in so far as claim matters are concerned in regard to rail transportation. The railroad has always maintained an experienced staff in its freight claim department for the prompt investigation and fair disposition of any claims for damage to or loss of consignments. There is every reason to expect that in connection with the conduct of motor carrier service by a subsidiary of the Rock Island similar treatment will be afforded.

Mr. BOE: I now offer in evidence Exhibit No. 3.

Exam. HIGGINS: Any objection, Mr. Shields?

Mr. SHIELDS: No, I believe not.

Exam. HIGGINS: Exhibit No. 3, heretofore identified by witness Davidson is received in evidence as Applicant's Exhibit No. 3.

(Applicant's Exhibit 3, Witness Davidson, received in evidence.)

Mr. BOE: Cross examine.

#### Cross Examination.

Q. (By Mr. SHIELDS) Mr. Davidson, why did you select the figure of 20,000 pounds as an average truckload in taking down your averages for 1936?

311 A. Why, Mr. Shields, that was my judgment based upon information received as to a fair average truckload of merchandise.

Q. It is your understanding, then, that that is an average truckload?

A. That was the average that I used and I was advised it was a fair average.

Q. Do you know what the actual limits are by law in the State of Iowa?

A. No, I am not familiar with that requirement.

Q. Now, as to this showing here during this period of years from 1929 to 1936, of a gradual reduction of L. C. L. traffic, you gave two reasons, in your judgment, that might have been the causes of bringing about that reduction, one being economic factors and the other the diversion to truck?

A. That is correct.

Q. Might there not be another reason, namely, that traffic is diverted to and handled in carload lots?

A. Well, that is carload business, Mr. Shields.

Q. In what respect?

A. Why, it is shipped as a carload. It is not the freight that is handled through your freight house and generally recognized as less than carload freight.

Q. Well, would not that traffic move as L. C. L. freight if it was not assembled and handled in carloads?

A. No doubt it would to a large extent.

312 Q. Then might not be that an element in the reduction of tonnage handled?

A. It is possible it would.

Q. In your position with the Rock Island are you of the opinion that your railroad company has been affected by the carloading practices?

A. I do not recall that I have testified about that.

Q. You testified as to the probable reasons for explaining this reduction.

A. That is correct, I cited two which occurred to me.

Q. Well, might there not be a third one, which I have mentioned?

A. I said there might be, yes.

Q. Now, you referred to four or five points where it required, I believe, third day delivery on Chicago freight set out at Iowa City, destined to these three or four other points?

A. Yes, sir.

Q. And by your proposed service here which you designate as coming within what is ordinarily termed as coordinated service, you could reduce that by one day, making second day delivery?

A. That is correct.

Q. Have you made any comparison as to what the motor carrier service is now from Chicago to those points?

313 A. No, I did not go into that movement from Chicago, Mr. Shields. I was undertaking to determine in

what manner the existing service could be improved upon by the use of truck haul—

Exam. HIGGINS: You mean rail service, don't you?

Mr. BOE: By that you mean existing rail service?

The WITNESS: Yes.

Q. (By Mr. SHIELDS) Existing Rock Island rail service?

A. Yes.

Q. Have you made any study in preparing the data you placed in your prepared statement, as to the cost of operating what are known as peddler runs, which would be comparable to your distribution from Iowa City on your set-out there?

A. No, I am not advised, Mr. Shields, on that.

Q. Do you know to what distances peddler runs can be operated to an advantage in territory such as you have to operate in there out of Iowa City?

A. Well, there is really no limit, Mr. Shields. It is an improvement, of necessity, largely in connection with the existing freight schedules.

Q. Do you mean to say there is no limit as to distance?

A. It might be one hundred miles, it might be two hundred miles, or whatever the distance might be to fit in with the general scheme of things which the railroad is attempting to establish in the general distribution of merchandise, in my opinion.

Q. You have not made any study of that, however?

A. Except my general knowledge after thirty-  
314 three years in the freight traffic game.

Q. Then what is it in your mind that is conclusive that this distribution from set-out cars at Iowa City would be to an advantage, if you have no idea as to the cost of peddler runs?

A. Will you repeat that question again?

Q. What is it in your mind that is conclusive to you that there would be an advantage to distribute this freight from Iowa City from the set-out cars at Iowa City in the manner you are proposing, when as a matter of fact you made no study of the cost of peddler cars?

A. These cases, Mr. Shields, undertake to show the advantages from the standpoint of time of arrival and delivery at destination. Certainly, it needs no argument that for a distance of 202 miles from Chicago, a service of 39 hours and 30 minutes is not the best.

Now, for that 202 miles with a coordinated service I have concluded it would be possible in 13 hours and 45 minutes to make deliveries, using the rail service to Silvis and the truck service for the short haul of 29 miles beyond.

Q. Now, isn't it true that there are two elements to be taken into consideration on any service, the amount of time and the amount of cost?

A. That is true.

Q. Now, did cost enter into this operation to the extent that it might not be an advantage to install it?

315. A. I would not think so. The flexibility of such a plan unquestionably would enable the curtailment of local train service.

Q. How much is handled at Tiffin now, L. C. L.?

A. Haven't those figures available, Mr. Shields, unless they are on the sheet.

Q. That is one of the points you referred to as being served out of Iowa City?

A. That is right.

Q. Do you have any information as to the tonnage to and from Marengo?

A. Durant, you mean?

Mr. BOE: Marengo, he said.

The WITNESS: No, this was not a cooked up statement, you know. I was not undertaking to pick out points which would serve with advantage.

Q. (By Mr. SHIELDS) I am not referring to any exhibit now, but to your prepared statement wherein you discuss this service out of Iowa City by truck to certain intermediate station points. Now, as I understand it, you have no information as to the amount of tonnage to Tiffin or Merango?

A. No.

Q. And you have no information as to the cost of the peddler runs to and from those places?

Exam. HIGGINS: Do you mean if the railroad included service from Iowa City to Tiffin—

Mr. SHIELDS: From Iowa City—

Exam. HIGGINS: —by peddler car?

Mr. SHIELDS: No, I am referring to a peddler motor carrier line.

The WITNESS: You mean, as a substitute service?

Mr. SHIELDS: Yes, truck lines use the uniform bill of lading, do they not?

The WITNESS: Not all of them, according to my information. Some of them do.

Q. What percentage of them would you judge do not?

A. I have been informed by a source of information that the majority do not.

Q. Have you made any investigation of that?

A. No, I have not.

Mr. SHIELDS: That is all of the cross examination.

Mr. BOE: No further re-direct.

Q. (By Exam. HIGGINS) Now, Mr. Davidson, just what is Exhibit No. 3 supposed to demonstrate?

A. The shrink in L. C. L. merchandise tonnage.

Q. At the particular points shown on the exhibit?

A. They are representative only.

Q. What is the particular significance of the legend which purports to translate the pounds by rail into truckloads, is that it?

317 A. That is right.

Q. And why did you attempt to translate the pounds by rail into truckloads?

A. As simple comparison of both of them, Mr. Examiner.

Q. That is its significance?

A. Yes.

Q. Then what is the significance under Moline related to the legend where it shows 0.60 under forwarded and 0.70 under received, what does that mean?

A. The explanation is at the foot of the page. At 20,000 pounds for the average load per truck in 1936, the figures are equal to the number of truckloads shown per day. In other words, we had six-tenths of one truckload average per day out of Moline during 1936.

Q. That is, originating at Moline?

A. That is right.

Q. And that is L. C. L. rail tonnage that is converted into truckloads?

A. That is right.

Q. And if I were to ask you the same question with respect to the other places, your explanation would be the same?

A. Yes, sir, the only difference would be in the decimal.

Q. Now, I believe you gave an illustration of using Silvis as your set-out point?

A. That is right.

318 Q. As your set-out point from Chicago on west bound deliveries?

A. That is right.

Q. How far is Silvis from Chicago?

A. About 170 or 175 miles.

Q. And that would be by all-rail movement, would it?

A. Yes.

Q. Out of Silvis you make distribution west bound, as I understand it, with respect to the restrictions between

East Moline or the Tri-Cities and Chicago serving points off your own line?

Mr. BOE: That is right.

Q. (By Exam. HIGGINS) There won't be any back hauling from Silvis into the territory, is that correct?

Mr. BOE: That is correct.

Q. (By Exam. HIGGINS) Now, you make distribution from Silvis to first Wilton?

A. Yes, sir.

Q. By truck?

A. That is right.

Q. And that will accomplish a saving over the present all-rail service of how many hours?

A. Well, I did not pick Wilton. I picked Durant as the first one.

Exam. HIGGINS: I cannot find Durant.

319 The WITNESS: And next I took West Liberty.

Exam. HIGGINS: All right, let us take West Liberty, and tell me what the proposed coordinated service would accomplish as a saving over your present all-rail service to West Liberty?

A. We figure we would save about 24 hours.

Q. Would that accomplish early morning delivery?

A. No, it would not, Mr. Examiner. It would be about noon. Or, no, it is 1:45 A. M. It would be noon of the second day instead of 1:45 A. M. of the third day, or the third morning.

Q. (By Exam. HIGGINS) You would also make deliveries, as I understand it, which would necessitate a haul of approximately 95 miles by truck. Did you not give one example of a 95 mile haul?

A. I did that to show the possibilities, yes, sir.

Q. And to the extent that you acquire these routes and intrastate rights, is it also proposed to serve by truck intermediate destinations between the set-out points on the movement from Chicago, Illinois?

A. Yes, sir.

Q. By truck?

A. That is one of the possibilities. We have not the definite plan worked out today.

Q. I understand that. I was just trying to ascertain whether or not this was the general line of delivering to the set-out points by rail and then making delivery to stations on either side and intermediate deliveries by truck by a pick-up and delivery service?

320 A. That is right.

Q. And I assume similarly on movements out of Omaha east bound to Chicago you would have a similar arrangement, that is, you would have some convenient set-out points and make distribution from those set-out points by truck?

A. That is right.

Q. Without, however, knowing at this time just what your exact arrangement will be?

A. That is right. As I say, we haven't the definite plan worked out today.

Q. You also propose to perform a straight truck service station to station without relation to any rail movement, on short hauls?

A. That is correct.

Q. Is that right?

A. That is right.

Q. What would be two short haul stations?

A. Well, take Davenport and Wilton Junction.

Q. All right, Davenport and Wilton Junction. As to any tonnage originating in Davenport destined to Wilton Junction, would there be any point in taking it out by rail and taking it off at the other end?

A. I don't think I got that.

321 Q. I mean, an L. C. L. movement.

A. No, I wouldn't think so. I do not think the volume would be sufficient.

Q. And how would that tonnage move, on rail billing?

A. It would move on rail billing.

Q. And at the rail rate?

A. Yes, sir.

Q. I think in your summation you said: "In so far as the rate aspect of this transaction is concerned, three distinct types of service occur to me"—

A. That is right.

Q. And the first one you mentioned is that it would be proper to operate as a highway carrier subject to regulation, at rates and charges comparable to those observed by highway competitors.

A. That is correct.

Q. Are you proposing to institute a direct truck service between Chicago and Omaha, with the exception of serving points between East Moline or the Tri-Cities and Chicago?

Mr. Boe: That is right.

Exam. Higgins: You propose to institute a direct truck service which will move tonnage from Chicago to Omaha and points intermediate, west, we will say, of Moline, without relationship to any rail movement, and moving at rail rates?

A. No, sir.

322 Q. (By Exam. HIGGINS) Moving at truck rates?

A. Yes, sir.

Q. Is not that the very matter that is coming before the Commission now in the Alko case?

Mr. BOE: I think so.

Exam. HIGGINS: Whether it is in the nature of competing with one's self?

Mr. BOE: I think so.

Exam. HIGGINS: Of course, the proposal here will be subject to whatever is permissible under the law and the decisions.

Mr. BOE: Oh, yes. This is the type of service we propose to offer. We want to utilize highway carrier service to its maximum economic value, especially having in mind the public interest in so far as railroad ownership and control is concerned, and if that can be accomplished by offering in addition to other types of service an all-highway service, we would like to be privileged to extend that service.

Exam. HIGGINS: Now, if you moved to certain set-out points by rail will not that necessitate increasing the loading of the set-out car moving out to those points and decreasing any L. C. L. merchandise cars now in service?

The WITNESS: That is quite likely to be the result.

Exam. HIGGINS: Can there be any question about it?

The WITNESS: I think not.

323 Q. (By Exam. HIGGINS) Do you know how much it costs to load a merchandise car?

A. No, I am sorry I haven't those figures.

Q. And the handling of it, the switching charges, and so on?

A. I know it is expensive, but I do not have the figures.

Q. Well, are you so familiar with it that you can say it would be more economical to perform that character of service than it would be to continue to run peddler car service by rail throughout?

A. I don't think I would care to go quite that far, Mr. Examiner.

Q. You have made no study of that?

A. No.

Q. Have you made any study to determine to what extent all of the facilities of the railroad can be used, so that this proposed service will be handled at perhaps just your out of pocket cost, without increasing the overhead? That is to say, can the present forces and facilities of the railroad conduct this service?

A. In my opinion, they can largely carry on. At some of the larger points, perhaps, additional forces might be needed. As to the space and the buildings, generally I would say they would be adequate to take on the extra burden.

Exam. HIGGINS: I think that is all.

Q. (By Mr. WIARD) Mr. Davidson, provided, of course, this service you mentioned under Number 1 of those  
324 rate services were established, a highway carrier service at highway rates, in establishing those rates and those tariffs in regard to them, would it be your policy to concur with other motor carriers, entirely with them, or would you just confine your operations to your own organization?

A. My answer to that would be this, that we have given it no consideration at the moment, but should we undertake to compete with other carriers it would appear to me to be necessary to establish joint rates with other trucking companies.

Exam. HIGGINS: Will you read me that answer, Mr. Reporter?

(The answer was read.)

Exam. HIGGINS: If you did that, you would be in the trucking business irrespective of any rail-truck coordination, would you not?

The WITNESS: That is correct.

Exam. HIGGINS: In other words, the railroad would be operating a motor carrier indirectly, irrespective of any coordination with its rail operations?

The WITNESS: That is correct. Counsel inquired as to the number one example.

Exam. HIGGINS: Yes, and I think that is one of the situations that is now pending before the Commission in the general hearing, is it not?

Mr. BOE: I think that is one of the general ques-  
325 tions involved in the Alko case.

Mr. WIARD: A question was asked as to a situation where some carrier bringing freight from the Tri-Cities to Des Moines would bring it down to Des Moines and interchange at that point. Now, if interchange arrangements were not provided for, why, then, you would feel, would you not, in denying that, that there would be decided public disadvantage to those points, say, like Newton, Iowa, because if they could not interchange with anybody then they would have to pay the local motor carrier rate and the local

rate by the Rock Island motor carriers, and that would certainly not be to the public advantage, would it?

Mr. BOE: Is this argument, or is it a question, Mr. Wiard?

Mr. WIARD: I think that has quite a bearing on your case here.

The WITNESS: I believe I have answered the gentleman's question, and with his explanation I can add nothing to it.

Exam. HIGGINS: Did I understand you to say that to the extent you were permitted to engage in straight motor truck operation that you would interchange with other motor carriers?

The WITNESS: That would be my judgment.

Exam. HIGGINS: Assuming that you engaged in that operation at all.

The WITNESS: Yes, sir, that would be my judgment.

326 Exam. HIGGINS: Does that answer your question?

Mr. WIARD: That answers my question.

Exam. HIGGINS: The assumption being that they were permitted to engage in a straight trucking operation.

Mr. WIARD: Yes.

Exam. HIGGINS: Have you finished?

Mr. WIARD: Yes.

Exam. HIGGINS: Anything further?

Mr. BOE: I am through with the direct.

Q. (By Mr. SHIELDS) You stated, Mr. Davidson, in the course of your direct examination that as to the cost of these operations the Rock Island with the present employes and facilities would be in a position to carry on these motor carrier operations to a pretty large extent, I understood, without any great increase of cost?

A. I made some exceptions at the larger points.

Q. Now, have you made any investigation of that proposition?

A. No, I have not personally investigated it.

Q. What did you predicate that statement on?

A. Information that I have obtained from time to time in connection with consideration of the subject.

Q. I asked you if you had made a study, and you said you had not?

A. No, I concede that I have made no study.

Q. You are taking someone else's statement for that?

327 A. I am expressing my opinion.

Q. Now, what had you to base that opinion upon, that is what I want to get?

A. Well, I base it upon information that had been supplied to me.

Mr. BOE: Does that include the experience you have had in the performance of your duties as assistant freight traffic manager for the Rock Island?

The WITNESS: Yes, that would have some bearing upon the question.

Mr. SHIELDS: That is all.

Mr. BOE: Thank you, Mr. Davidson.

(Witness excused.)

Mr. BOE: I will call Mr. Lawrence E. Stone.

LAWRENCE E. STONE, was sworn and testified as follows:

### Direct Examination.

Q. (By Mr. BOE) What is your name and address?

A. Lawrence E. Stone; Des Moines, Iowa.

Exam. HIGGINS: Before Mr. Stone commences with the direct examination, there is just one question I would like to ask him so the record will be clear.

It seems to me, Mr. Boe, at the beginning of the hearing, I asked whether or not the White Line Storage & Transfer Company—

328 Mr. BOE: Yes, sir.

Exam. HIGGINS: —the corporation which Mr. Stone is to control if the application is approved, in his own individual capacity, was a motor carrier engaged in interstate commerce, and as I recall, you said it was not.

Mr. BOE: I think I confined that statement to common carrier service. My information is that to a more or less greater extent there are some contract carrier operations conducted by the White Line Transfer & Storage Company.

Exam. HIGGINS: And I understand the White Line Transfer & Storage Company filed a grandfather application, did it not?

The WITNESS: Yes, sir.

Mr. BOE: I think they did.

Exam. HIGGINS: As what?

The WITNESS: As a common carrier motor truck operator.

Exam. HIGGINS: In interstate commerce?

The WITNESS: In interstate commerce, because we were advised that in the hauling of household goods long distances interstate, that the Interstate Commerce Commis-

sion called all such household goods carriers common carriers.

Exam. HIGGINS: It is only with respect to household furniture carrying?

The WITNESS: Yes, to a limited long distance common carrier truck operation.

Mr. BOE: Would this enlighten the Examiner any, 329 if I made the statement that the contract which is in issue here specifically refers to the extent to which the White Line Transfer & Storage Company will engage in business, should this application be approved, both as to the character and kind of business in which it will engage. That is all in the contract.

Exam. HIGGINS: What is that?

Mr. HURLBURT: I have it right here.

Mr. BOE: Have you that section of the contract?

Mr. HURLBURT: Yes. Your Honor, there are certain definite requirements as to the extent of the business in which the Storage Company may engage after the consummation of this other transaction, and I think I can give that to you very briefly.

In the first place, there is a provision that the Storage Company will not, for a period of five years, after the completed conveyance of the property, maintain any branch office or place of business in any location except in the city of Des Moines, Iowa.

And then there is a further provision that it will not operate over any of the route or routes that are covered by the operating rights of the other two companies.

Exam. HIGGINS: After sale to the applicant?

Mr. HURLBURT: That is correct.

Then there is the further provision that except—and I should clarify that by saying that the Storage Company 330 may engage in the transportation and hauling of household goods over those routes, and the transportation of heavy equipment, heavy machinery, and items such as hoists, and that sort of thing, and the transportation of new automobiles by motor truck.

Exam. HIGGINS: They may do that?

Mr. HURLBURT: They may do that, that is right.

Now, I was wondering, and I had this thought in mind in view of the possible question, whether it would not be desirable for the purpose of clarifying the record, if I asked authority at this time to enter appearances on behalf of the Transfer & Storage Company and also L. E. Stone,

and further ask permission to file petitions of intervention for those two parties, asking that the application filed be granted.

Exam. HIGGINS: I cannot see any objection to that. It would merely mean that you say Mr. Stone is interested in supporting that application.

Now, the only question that concerns me is whether Mr. Stone, because he now is operating or is connected in some official capacity with the two carriers here involved, and since he is a party to this same contract, seeking to acquire control of the Transfer & Storage Company, he ought to file a separate application, or ought we to make him a party to this application? Have you given that any consideration? I, of course, do not know whether you have given any thought to that or not, but it might be possible

331 he does not at the present time control any other motor carrier, and is seeking now in this hearing to control this company and be exempt from the statute. Of course, I do not know whether that is true or not.

Mr. BOE: Mr. Stone does not own control of any company.

Exam. HIGGINS: Mr. Stone at the present time does not control these two carriers?

Mr. BOE: He does not control any of the carriers.

Exam. HIGGINS: They are in the control of Mrs. Mills?

Mr. BOE: Yes. Mr. Stone has an option to purchase the entire capital stock of the three corporations.

Exam. HIGGINS: So that then Mr. Stone will be in fact in control of a motor carrier for the first time?

Mr. BOE: Yes.

Exam. HIGGINS: And does not now control any other motor carrier?

Mr. BOE: I think that is true.

Exam. HIGGINS: How many motor vehicles will be left in the Transfer & Storage Company?

The WITNESS: We have forty-nine.

Exam. HIGGINS: And the Transfer & Storage Company will still have forty-nine vehicles?

The WITNESS: Yes, you see we do quite an extensive business.

Mr. BOE: And when you say that, you mean—

The WITNESS: In Interstate Commerce.

332 Exam. HIGGINS: That is all interstate business?

Mr. BOE: Right.

Exam. HIGGINS: And then you have the household goods business?

The WITNESS: Yes.

Exam. HIGGINS: And where is that at?

The WITNESS: At Des Moines.

Exam. HIGGINS: And to various states?

The WITNESS: Yes.

Exam. HIGGINS: By truck operation.

The WITNESS: Yes, sir.

Q. (By Mr. HIGGINS) And you are still going to maintain that with these forty-nine vehicles?

A. The forty-nine vehicles, yes, sir, that is all we have left. They will do that work and our city work.

Q. And they are going to be retained for that business?

A. Yes.

Exam. HIGGINS: Ad the balance will, of course, pass to the applicant if the application is approved?

Mr. BOE: Yes.

Mr. HURLBURT: I might add—I don't know whether it is clear to your Honor—but that handling of household goods will be a very very minor part of the Transfer & Storage business. It is the local hauling to the local warehouse and the local warehousing that I would say involves well over ninety per cent of the company's activities.

Mr. SHIELDS: Will there be any of the over-the-road business handled by the Storage Company in interstate under the application it now has pending with the Interstate Commerce Commission, other than household goods?

The WITNESS: Yes.

Exam. HIGGINS: Yes, there were some exceptions he gave. What were they?

Mr. SHIELDS: Heavy machinery and household goods.

Exam. HIGGINS: Heavy machinery and household goods may be moved over these same routes.

Mr. SHIELDS: No, not over these operations—

Exam. HIGGINS: Does that answer your question?

Mr. SHIELDS: Yes.

The WITNESS: Did you mention new automobiles and special equipment?

Mr. SHIELDS: No.

The WITNESS: In other words, Mr. Shields, the contract we have entered into allows the White Line Transfer & Storage Company and, or myself to haul those things that

are not generally hauled by a common motor freight carrier operating between fixed termini.

Mr. SHIELDS: That is all well and good, but how are you going to determine what those items are?

Exam. HIGGINS: They are definitely specified in 334 the contract.

Mr. BOE: Yes: (a) The transportation of liquors, and so forth; (b) the transportation of household goods, and so forth; (c) the transportation of heavy equipment and heavy machinery; (d) the transportation of new automobiles by truck.

The WITNESS: That is all set forth in the contract.

Mr. SHIELDS: But how are you going to place a limitation on any machinery and heavy equipment?

The WITNESS: It says here "the transportation of heavy equipment and heavy machinery, where special hoists, jacks, winches, cranes or similar devices are required in the loading or unloading of such property for transportation".

Exam. HIGGINS: I suppose the purpose of that was to keep Mr. Stone from being in direct competition with you on the commodities that go to you?

Mr. BOE: That is right; that is the purpose of this limitation.

Mr. HURLBURT: And the idea was to include only such items as the normal truck operator would not be equipped to handle.

Exam. HIGGINS: Yes.

Mr. HURLBURT: And I think the Rock Island took care of this specification in that respect.

Now, your Honor, for the sake of the record, I would like to again ask for permission at this time to enter an appearance on behalf of the White Line Transfer & Storage Company and Lawrence E. Stone, and ask also the opportunity and privilege to file petitions of intervention in their behalf.

Mr. BOE: In support of this application which is being submitted today?

Mr. HURLBURT: Yes.

Exam. HIGGINS: If you filed a written plea, would it in any way broaden the issues under this application?

Mr. HURLBURT: No, sir.

Exam. HIGGINS: I doubt whether a written petition would add anything to what has already been presented, and I do not believe you should be put to any added expense.

Mr. HURLBURT: Well, I just wanted my position clarified on the record, was all.

Exam. HIGGINS: Very well, you may show your appearance, then, on behalf of the Storage & Transfer Company and Mr. L. E. Stone, as an individual, in behalf of the application. Is that the way you want that to appear?

Mr. HURLBURT: I think so, and your Honor does not think it is necessary to file a petition of intervention?

Exam. HIGGINS: No, I do not think so.

Mr. BOE: I think the record is sufficiently clear, Mr. Examiner.

Exam. HIGGINS: And you also want to appear for the other two companies?

336 Mr. HURLBURT: Yes, sir, I have already entered my appearance for them.

Q. (By Mr. BOE) Now, will you proceed with your testimony with respect to this transaction, Mr. Stone?

A. Yes. The White Line Transfer & Storage Company was founded in Des Moines, Iowa, in 1880 by Pleasant J. Mills. It has continuously operated under a trade name and as a corporation, its present form, since such date.

Mr. Mills, the founder of the business, built in 1893, the first public warehouse in the State of Iowa. In 1909 he built the first fireproof warehouse in the state. The company's activities have consisted of the hauling of freight from the railroad freight stations to various retail establishments, jobbing house, public utilities, manufacturers and other institutions. It has carried on a complete storage service, including furs in a specially constructed vault, and has a complete cold storage equipment. It has a complete moving, packing, crating and forwarding service for household goods. It warehouses and distributes merchandise for over one hundred nationally known manufacturers and jobbers, and is handling freight for approximately five hundred business institutions in the city of Des Moines.

To meet the requirements of a growing community and the developments and changes in the transportation field, motor equipment and paved highways, it has changed  
337 its manner of operation. In 1927 trucking activities were increased.

White Line Motor Freight Company, Inc., was organized as an outgrowth of the White Line Transfer & Storage Company of Des Moines, Iowa. The White Line Motor Freight Company, Inc., was originally organized as an Iowa corporation on January 15, 1930, under the name of the Highway Freight Transfer Company. The articles of such corporation were amended on July 22, 1930, and the name of

this company was changed to the White Line Motor Freight Company, Inc.

In 1933 the White Line Trucking Company was organized under the laws of Iowa.

The control and ownership of the three companies remained unchanged until July 14, 1933, when Pleasant J. Mills, the founder, died, and his widow, May E. Mills, succeeded to such ownership and control. She is approximately seventy-six years old and is inexperienced in business matters, having neither the desire nor the physical ability to manage or control such a business as is being conducted by these corporations. Since the time of her husband's death, she has had but one desire, and that to relieve herself of the worry and responsibility of the ownership of said companies.

I have made repeated effort to sell the three companies, and in order to meet her desires, it has been necessary to sell the companies in one transaction. This, of course, has been difficult to do, and while various persons have  
 338 indicated interest in the purchase of one or more of the companies, no opportunity has presented itself to dispose of all the companies as a unit. The proposed sale to the Rock Island Motor Transit Company meets her desires in that she is making a complete disposition of the properties and thereby relieving herself of the worries of all active business. Prior to commencing negotiations with the Rock Island Motor Transit Company for the sale of the physical properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, Mrs. Mills gave me an option on all her stock in these two companies, and also White Line Transfer & Storage Company.

I have been connected with the operations of these companies in an executive capacity since 1925. I have been familiar and am familiar with motor truck operations over the routes on which we have operated. It is my opinion that the proposed acquisition by the Rock Island is not inconsistent with the provisions of Section 213 of the Motor Carrier Act, 1935, but on the contrary will promote the public interest in that it will permit such company to use service by motor vehicle to public advantage in its operations. I further believe that with the amount of operations by other carriers, both by highway vehicle and railroad, over these routes, that such acquisition will not unduly restrain competition.

339 I believe that the Rock Island Motor Transit Company can operate over our routes profitably and to public benefit. It will have the advantage over our operation in that there will be more confidence by shippers in its operations. There will be more confidence in the accounting of moneys in the handling of C. O. D. shipments. Many shippers do not have complete confidence in the ability of some truck lines to properly account for such funds. It is my opinion that shippers will have more confidence in the prompt and satisfactory disposition of claims if the operation is under the direction or control of the Rock Island. These items will make for a larger and better volume of business without any sacrifice of service to patrons. The Rock Island management and ownership will be active. The present owner of the White Line companies, Mrs. Mills, has been inactive and is inexperienced in conducting a transportation business. Economies can be effected in the matter of terminal expense, personnel, and better buying power. There will be a tendency toward the stabilization of rates and the coordinated service between rail and truck will result in a larger and better volume of business. It should result in a better balanced operation, reducing to a minimum the operation of empty equipment. One of our chief difficulties has been the fact that our operation has not been sufficiently balanced.

That is all I have.

340 Q. (By Mr. BOE) Now, Mr. Stone, at what points, principal points, does the White Line Motor Freight Company in this territory maintain facilities for the transaction of its business?

A. Beginning at Chicago, Davenport, Iowa City, Cedar Rapids, Newton, Des Moines, and Atlantic, and Omaha.

Exam. HIGGINS: How many is that, about eight?

Mr. BOE: About that, I think.

Exam. HIGGINS: What are those, terminals, at those points?

The WITNESS: Yes, sir.

Exam. HIGGINS: And how many has the Rock Island between Chicago and Omaha?

Mr. BOE: Our map shows that.

Exam. HIGGINS: Well, what is it, thirty?

Mr. BOE: Oh, I think it is probably more than that.

Exam. HIGGINS: Sixty?

Mr. BOE: Have you anything to offer on that, Mr. Davidson? I think that Mr. Davidson can answer that question.

and I think it is pertinent. He will furnish that information later.

Q. (By Mr. BOE) Now, the White Line Motor Freight Company and White Line Trucking Company undertake to do business at numerous other points at which they have no agents or facilities, is that true?

A. Yes, sir.

341 Q. And has that situation; that is, the lack of agencies or facilities been a handicap to the development of the White Line Motor Freight Company business to its maximum efficiency?

A. Yes, sir.

Exam. HIGGINS: Do you mind if I interrupt just a moment?

Mr. BOE: No, sir.

Exam. HIGGINS: At these intermediate stations how could the companies pick up if there was not any one there to receive the freight? Do they have to take it up to the freight station and haul it in the morning?

The WITNESS: We do that, but most of the time we run what is called a day peddler service. For instance, going out of Des Moines west to Council Bluffs, a distance of 140 miles, with the exception of one town in between, that is Atlantic, we have no facilities, so that it is necessary to run day peddler service, and we start out of Des Moines going west about 5 A. M. or 5:30 A. M., as early as we can possibly start, in order to arrive at the first town when the store is open.

On the peddler run when we finally get down toward the end of the run, it is after lunch time, whereas if we had stations we could deliver the freight to those stations during the night and have it ready for the morning—

Q. (By Exam. HIGGINS) Have local drayage in the morning?

A. Have local drayage in the morning, yes, at every point early the next morning.

342 Q. Is that not what the Rock Island plans to do?  
Mr. BOE: Yes, sir, by utilizing its existing facilities at all these numerous intermediate points where the White Line Motor Freight and White Line Trucking do not now have such facilities, at these small towns.

Exam. HIGGINS: Do you use local drayage men at all these small points?

Mr. BOE: Yes, Mr. Davidson testified they use local drayage in all this territory.

Exam. HIGGINS: All right, that shows the comparative situation, then.

The WITNESS: I would just like to bring out a little more on that point, if I might, Mr. Examiner.

Exam. HIGGINS: Yes.

The WITNESS: We can deliver freight from Des Moines to Chicago and deliver it to the customers, a distance of 360 miles, quicker than we are delivering freight from Des Moines to Grinnell, Iowa, a distance of 60 miles, for the reason that we get that freight, say, at 5 or 5:30 at night in both instances, and we can be in Chicago around 7 or 8 o'clock in the morning and deliver the freight the next morning, while going from Des Moines to Grinnell on a peddler run we get in there about noon.

Q. (By Mr. BOE) If there were local station facilities for dropping off such shipments, what would the situation be?

A. At Grinnell we could deliver it the first thing  
343 the next morning, because it would be shipped there tonight.

Q. By utilizing the existing station and joint facilities that saving in time would be available?

A. Yes, sir.

Q. Have you any other instances where a similar saving in time of service might be made over what the existing service now affords?

A. Well, about the same story prevails in all the towns. I used Grinnell just as an example, but the same thing fits in, practically speaking, to every town where we do not have a terminal.

Q. Now, you gave some reference in your previous testimony to a balanced service, which does not now exist. Do you have reference to empty trucks in one direction and loaded trucks in the other direction?

A. Yes, sir.

Q. Can you amplify that a little bit?

A. Well, out of Chicago there is always a tremendous amount of west bound tonnage and a very small amount of east bound tonnage that we can secure. The same thing applies between Des Moines and Omaha. We have more east bound tonnage out of Omaha than we have west bound freight out of Des Moines to Omaha. Des Moines to Louisville, the same thing. In other words, the larger the city

the more freight originates there and moves out, and  
344 so if you end on your run at a smaller town you have an unbalanced tonnage because that small town cannot supply the amount of tonnage that the larger town can.

Q. Now, how could that inefficient service be improved, in your opinion, by railroad control?

A. The railroad could use those trucks for their own freight, which would naturally give them an increased amount of tonnage from the weak points.

Q. So that you think, with the existing highway tonnage, supplemented by such rail tonnage as might practically move between given points, it would increase the loaded movement of your trucks in both directions?

A. Yes, it would.

Q. And eliminate this unbalanced operation that you refer to in your testimony?

A. Yes, sir.

Q. Now, you made some reference to the fact that other motor carriers are operating in this territory. Can you amplify that statement a little bit?

A. Yes, sir. Do you want the names of them?

Q. Yes, if you can refer to some typical cases and points.

A. Out of Omaha there is the Merchants Motor Freight Company, the Union Transfer Company, Watson Brothers, three large motor freight carriers, in addition to our own, and a number of smaller operators such as the Atlantic Motor Freight Company operating out of Omaha, the 345 Brady Transfer & Storage Company of Fort Dodge, and a number of contract haulers operating out of Omaha west of our route. I just have one in mind now, and that is the Meadows Transfer & Storage Company. There are also an unlimited number of what we call cattle haulers going into Omaha with live stock from western Iowa, and it seems as though, if you meet them on the highway at night, there is a stream of them, and when they get unloaded and get the stock out, they all hunt freight back west, at most any price. That is what we commonly call the hog hauler out there, or cattle hauler.

Out of Davenport we have the Merchants Transfer & Storage Company of Davenport, hauling a large amount of contract freight, a number of contracts. We have the Meadows Transfer Company, and the Merchants Transfer & Storage Company of Des Moines.

Then we have common carriers out of Davenport, the principal one of which is the Keeshin Motor Express Co., Inc., National Freight Lines, controlled by Keeshin Motor Express, and the Reliable Transit Company, I understand, are operating through there now, and a number of smaller operators.

Out of Chicago going into the Tri-Cities I think there are about sixteen or seventeen, at least there are a sufficient number of common carriers running regular motor freight service on regular schedules and rates, so that they have a private tariff bureau and issue their rates. I think 346 Mr. Scanlan, sitting over there, is connected with them. I think he is their agent. The largest one is Mr. Keeshin, I believe, and the next largest the Pioneer, the Rock Island Transfer Company, the Reliable Transit Line, the Interstate—Interstate Trucking, I think it is, I don't know the rest of the name, but we always call it Interstate, and the Western Freight Lines. That is the largest group.

Out of Des Moines, operating interstate, there is the Keeshin Motor Express, National Transfer, Merchants Motor Freight Company, the Watson Brothers, Reliable Transit, Western Freight Lines, Brady, Akron Motor Cargo, and—well, I don't know, I wouldn't say positively I have mentioned all of them, but I guess I have covered them pretty well, but there are those large operators and many contract haulers.

Q. And those motor carriers you have enumerated operate on the routes of the White Line Motor Freight Company and White Line Trucking Company between Chicago and Omaha through the Tri-Cities and Des Moines to some of the points—to all of the points or some of the points that are between those extreme termini, Chicago and Omaha, is that true?

A. Yes, sir.

Q. And with more or less frequency as to daily service, number of trucks involved, type of merchandise transported, and all directly competitive with the White Line Motor Freight Company and the White Line Trucking Com- 347 pany and the rail service of The Chicago, Rock Island & Pacific Railway Company, is that true?

A. Yes, sir, that is true.

Exam. HIGGINS: To the extent that Mr. Gillespie could not remember whether or not the ones named were in active competition, I take it that this witness' testimony is a matter of personal knowledge?

The WITNESS: From personal knowledge, yes, sir, very personal.

Mr. BOE: That is a matter of your personal knowledge?

The WITNESS: Yes.

Q. (By Mr. BOE) And acquired as an official of the White Line Motor Freight Company and White Line Trucking Company during the period you have indicated?

A. Yes, I got over a lot of bumps they have all given me as competitors.

Exam. HIGGINS: Competition now is not a matter of one-sided activity; is it?

The WITNESS: No. They remember it, too.

Q. (By Mr. BOE) Some suggestion has been made on the record with respect to the routes of the White Line Motor Freight Company, Inc., east of Chicago, Mr. Stone. Will you state what disposition has been made of those routes, or is proposed, if they have not actually been disposed of?

A. We made a contract with the Midwest Transit Company owned by a Mr. Bell, I think it is Mr. Bell, 348 doing business as the Midwest Transit Company, to take over the operation east of Chicago, to Indiana and Michigan, and the hearing was had at Lansing, Michigan, in the early part of September before an Examiner.

Q. Before an Examiner of the Interstate Commerce Commission?

A. Yes, sir.

Exam. HIGGINS: That is Docket MC-F-304.

Mr. BOE: I believe that is all I have on direct with Mr. Stone.

#### Cross Examination.

Q. (By Mr. SHIELDS) I wanted to find out your position with the three corporations; take the Transfer & Storage Company, and I understood you are president of that company?

A. Yes, sir.

Q. And what is your position with the other two companies?

A. Vice president and secretary of the Motor Freight Company, and I will ask my counsel to help me—

Mr. HURLBURT: I think you are president and treasurer—

The WITNESS: And president and treasurer of the Trucking Company. Have I given them all?

Mr. HURLBURT: That is your answer, not mine.

Q. (By Mr. SHIELDS) President of the Motor Trucking Company?

A. Of the White Line Trucking Company, yes, sir.

Q. And you are vice president and secretary of the White Line—

349 A. White Line Motor Freight Company.

Q. Incorporated?

A. Yes, sir.

Mr. SHIELDS: That is all the questions I have.

Re-direct Examination.

Q. (By Mr. BOE) May I ask one additional question on re-direct?

Exam. HIGGINS: Yes.

Q. (By Mr. BOE) Some financial statements will be offered shortly in relation to the White Line Motor Freight Company, White Line Trucking Company and White Line Transfer & Storage Company, Mr. Stone. I think you are familiar with them in a general way, are you not?

A. Yes, sir.

Q. I think that some of those statements will refer to a change in the fiscal year for accounting purposes, of those companies. I would like to have you make some comments with respect to the change in the fiscal year.

Exam. HIGGINS: Can he not do that when the exhibits are presented?

Mr. BOE: Well, I was going to suggest we might stipulate those accounting statements are in for any examination with respect to them. We have an accountant here who can explain them.

Exam. HIGGINS: Very well, let him go ahead, anyhow.

350 The WITNESS: We have had our books audited each year by a certified public accountant, Wolf & Company. Now, our fiscal year ended December 31st, and they also had a tremendous amount of business to do after December 31st, and they also made up our income tax reports for the federal government, and the state of Iowa. They suggested that we change our fiscal year to June 30th instead of December 31st in order to allow them to do this work at a time when they were not so very busy, and they could give us much better service in getting out the reports very promptly, and so forth, and so we asked permission of the federal government to change our fiscal year beginning June 30, 1936.

We made a report ending December the 31st, 1935. Therefore, we had to make a six months' report ending June 30, 1936, and then we make a yearly report ending June 30, 1937, and all other years from then on.

Mr. BOE: That is all.

Exam. HIGGINS: As I understand the situation now, if this application is finally approved, the Rock Island Motor Transit Company will expend \$59,400 for the operating rights and the physical property of the two White Line companies, except the Transfer & Storage Company, is that correct?

A. Yes, sir, that is correct.

Q. (By Exam. HIGGINS) I understand it is further proposed that the two White Line Companies, except the  
351 Transfer & Storage Company, will be dissolved?

A. Yes, sir, that is right.

Q. Is the applicant assuming any liabilities of the two White Line companies except the \$9,400?

A. No, sir, they are not.

Q. So there is no assumption then of any liability?

Mr. BOE: That is right.

Exam. HIGGINS: That is correct.

The WITNESS: That is correct.

Mr. BOE: That is right, and it is so provided in the contract.

Exam. HIGGINS: Then all, in the strict sense of the word that this come to, is a merger of those two corporations and then the two merged companies are turned over to the Rock Island Motor Transit Company?

Mr. BOE: That is right.

Exam. HIGGINS: Certainly, in a technical sense, it is pretty close to a merger?

Mr. BOE: I think that is right.

Exam. HIGGINS: And the White Line Transfer & Storage Company is going to be retained by you, Mr. Store?

The WITNESS: Yes, sir.

Exam. HIGGINS: And forty-nine motor vehicles?

The WITNESS: Yes, sir.

Exam. HIGGINS: Are any of the other assets of the  
b 352 other two White Line Companies, the White Line Trucking Company, and White Line Motor Freight Company, passing to you?

The WITNESS: I believe all of the accounts receivable and the garage building at Des Moines, some garage tools at Des Moines, and I presume the liabilities.

Q. (By Exam. HIGGINS) Of the two separate corporations?

A. Yes, sir. I might add, Mr. Examiner, that the accounts receivable, and the C. O. D. receivables, are about the same as the current liabilities of the two corporations.

referred to. They just about offset each other. There might be a little balance of approximately \$5,000 in the assets, but it is hard to determine that. I don't know exactly whether we will collect all of our accounts or not. We have them in pretty fair shape, but there is always a shrink when you got to collect such things.

Q. Are you doing that as an individual?

A. Yes, sir.

Q. And not as the Storage & Transfer Company?

A. No.

Q. And will the accounts receivable and trucks and the garage at Des Moines and the garage tools and C. O. D. receivables pass to you as an individual?

A. Yes, sir.

Q. And you are going to assume the outstanding payables of both of those companies?

353 A. Yes, sir.

Q. And you are hoping in the final adjustment one will offset the other?

A. Well, I know they will, and there will be the garage building in addition.

Q. Now, that is a complete story of the entire transaction, is it?

Mr. BOB: I think that is so, and I think that is all specifically covered in the contracts that are submitted, all those incidental factors are fully covered by the contracts. There is a complete schedule of the equipment that is proposed to be transferred and that which is not proposed to be transferred.

Exam. HIGGINS: Are you aware of the fact that the articles of incorporation of the White Line Transfer & Storage Company provide that the corporation shall not be a common carrier?

The WITNESS: I was not aware of that before, Mr. Examiner.

Exam. HIGGINS: Well, it is a fact, is it not?

The WITNESS: But, Mr. Examiner, we always said that the White Line Transfer & Storage Company was not a common carrier and reserved the right to accept contract business at any time. Most of the Transfer & Storage Companies in the United States have the same policy. But we have told our people and obtained authority on that now, to be a common carrier.

Exam. HIGGINS: I believe there is some additional  
354 competent authority in the Supreme Court decisions to the effect it is not what your charter says you may

be or what you hold yourselves to be, but what you do is the test.

The WITNESS: We also applied for permit as a contract carrier, because we have contracts which might be interstate contracts so far as the railroads are concerned.

Q. (By Exam. HIGGINS) Do you perform pick-up and delivery for the rails at Des Moines?

A. Yes, sir.

Q. And are the present officers and directors of the White Line corporations interlocking, are they the same?

A. Yes, sir, I think they are all the same.

Mr. HURLBURT: They are the same group outside of Mrs. Mills, and they have only qualifying shares.

Exam. HIGGINS: Mrs. Mills owns the stock?

Mr. HURLBURT: Yes, she holds everything except some qualifying shares only.

Q. (By Exam. HIGGINS) Did any of these corporations acquire the operations of the Highway Corporation, or whatever the name of that concern is?

A. Yes.

Q. Who bought that?

A. The White Line Transfer & Storage Company bought the equipment from the Transfer Company.

Q. Did they buy any operating rights?

355 A. Yes, I think they received them.

Q. Interstate?

A. Whatever they might have been, but it was mostly a local operation. He confined his business to local business.

Q. It was not a matter that involved an interstate movement for which you should have filed an application?

A. Well, I don't think so.

Q. Did the Highway Company do any over-the-road hauling?

A. Not that I know of, just locally.

Q. Only locally in Des Moines?

A. Yes, sir.

Q. Did either of these two companies—and I am not speaking of the Transfer & Storage Company—keep separate accounts showing the results of operations between Omaha and Chicago?

A. Yes, sir, they keep a complete set of books.

Q. Each one?

A. Each one of them, yes.

Q. Did they show their operations between Chicago and Omaha separately from the other operations? In other

words, did they both conduct profitable operations between Chicago and Omaha?

A. Well, both of them lately have conducted unprofitable operations.

Q. Do you keep your revenues and expenses between Chicago and Omaha segregated for each separate corporation?

356 A. Yes, sir, segregated in this way, Mr. Examiner, we know exactly what business the two corporations did, and I believe we have a fairly complete record of the volume of business they have done between points.

Q. Perhaps I did not state that as precisely as I might have done. Do you know what the net income or deficit for the two separate companies between Chicago and Omaha has been for the past two years and up to date?

A. Yes, sir.

Exam. HIGGINS: Are you going to present that?

Mr. BOE: Right.

Exam. HIGGINS: You see, that gets it down to the particular route each one operates over and that is precisely what I want.

Mr. BOE: I have financial statements as between the three companies for that period.

Exam. HIGGINS: What is the earliest period?

Mr. BOE: For the full year 1935 right down to date.

Exam. HIGGINS: Will you tell me the corporations that compete within the same identical states, and render paralleling service over the same identical routes, between the same points?

The WITNESS: Yes, sir, I will be very glad to answer that.

Exam. HIGGINS: I wish you would, please.

The WITNESS: You will notice, Mr. Examiner, both corporations were formed back in 1930 and 1933, a period  
357 prior to any knowledge of any Interstate laws pertaining to the operation.

We first operated the White Line Motor Freight Company interstate between Chicago and Des Moines. It was necessary to segregate that part of our business from the transfer business on account of the laws of the State of Iowa, which charged a tremendous ton mile tax on common carriers operating from fixed termini, either intrastate or interstate.

Mr. BOE: Do you mean by "from fixed termini" between fixed termini?

The WITNESS: Between fixed termini, and did not charge any ton mile tax on contract haulers. We did an extensive

or a large amount of business with the A. & P., the wholesale grocers, or the Great Atlantic & Pacific Tea Company—

Exam. HIGGINS: I have heard of that concern.

The WITNESS: Yes, sir. They do not deal with common carrier motor freight hauls but deal only with contract haulers. We also had trouble on insurance, that is, on our P. L. and P. D. principally. The P. D. insurance was easy to obtain for some reason or another for a contract hauler, but not easy to obtain for the White Line Motor Freight Company common carrier operating between fixed termini over fixed routes between Omaha and Chicago. We had separate insurance, one for the White Line Motor Freight Company and one for the White Line Trucking Company. We did not have to pay a tax on contract work on

Highway No. 6, but we operated the White Line 358 Trucking Company as a contract hauler and the

White Line Motor Freight Company as a common carrier, for those two reasons, taxes and insurance.

Exam. HIGGINS: You had the detriments on the one side and the benefits on the other?

The WITNESS: Yes.

Exam. HIGGINS: And whatever benefits you got came from the contract hauling?

The WITNESS: Yes, sir.

Exam. HIGGINS: That is all.

Mr. BOE: That is all on direct.

(Witness excused.)

Mr. DAVIDSON: Mr. Examiner, you inquired about the number of terminals which the Rock Island had between Chicago and Omaha?

Exam. HIGGINS: Yes.

Mr. DAVIDSON: Including the Chicago station, and stations at East Moline, Moline and Rock Island; and the stations west, they have approximately fifty open stations.

Exam. HIGGINS: Thank you.

E. H. SMITH was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) Will you give your name and address to the reporter?

359 A. E. H. Smith, LaSalle Street Station, Chicago, Illinois.

Q. And what is your business or occupation?

A. General accountant on the staff of the general audi-

tor for the trustees of The Chicago, Rock Island & Pacific Railway Company.

Q. Does that general auditor have the custody of such books and records as are maintained by the applicant in this case, the Rock Island Motor Transit Company?

A. Yes, sir, he is auditor of that company.

Q. How long have you been connected with the accounting department of The Chicago, Rock Island & Pacific Railway Company and its trustees?

A. Twenty-eight years.

Q. And that service has been confined entirely to the accounting department?

A. Yes, sir.

Q. And you are familiar with the keeping of accounts by the trustees of The Chicago, Rock Island & Pacific Railway Company?

A. Yes, sir.

Q. Showing you exhibits marked for identification Exhibits No. 4, No. 5, and Exhibit No. 6, I will ask you, whether you prepared these or caused them to be prepared?

A. Yes, sir.

Q. From what source was the information drawn, which appears on those exhibits?

360 A. It was taken from the books and accounts and records of the Rock Island Motor Transit Company, kept in the auditor's office in Chicago.

Q. Such books and records as are kept in the usual and regular course of business, is that true?

A. Yes, sir.

Q. And will you explain what they are?

A. Exhibit 4 is a profit and loss statement of the Rock Island Motor Transit Company at December 31, 1935, December 31, 1936, and October 31, 1937.

Q. And are these Exhibits 4, 5 and 6 true and correct, to the best of your knowledge and belief?

A. They are.

Mr. BEE: I offer them in evidence as Exhibits 4, 5 and 6.

Exam. HIGGINS: Any objection?

Mr. SHIELDS: No objection.

Exam. HIGGINS: The exhibits just identified by the witness will be received in evidence with the same markings; they consist of profit and loss statements of the Rock Island Motor Transit Company for the years 1935 and 1936, and the period January 1 to October 31, 1937, being Exhibit No. 4; balance sheet of Rock Island Motor Transit

Company, for the same years and period, and the giving effect to the proposed transaction balance sheet, will be marked Exhibits 4, 5 and 6, respectively, and received in evidence.

(Applicant's Exhibits 4, 5 and 6, Witness Smith, received in evidence.)

Q. (By Mr. BOE) Showing you now a statement marked as Exhibit No. 7, Mr. Smith, I will ask you what that is, if you know?

A. Sheet 1 is the profit and loss account of The Chicago, Rock Island & Pacific Railway Company, Trustees' account, as of December 31, 1936, and 1935, and at August 31, 1937.

Sheets 2 and 3, income account statement of The Chicago, Rock Island & Pacific Railway Company, trustees' account, for the years ended December 31, 1935 and 1936, and eight months ended August 31, 1937. Sheets 4 and 5, general balance sheets of The Chicago, Rock Island & Pacific Railway Company, trustees' account, as of December 31, 1935, and 1936, and for the eight months of 1937 ending August 31, 1937.

Sheet 6, the contingent liabilities not in the balance sheet of The Chicago, Rock Island & Pacific Railway Company, and also arrears in cumulative dividends; also total ledger value of securities pledged as collateral for any long-term obligations, short-term loans, or to secure performance of contracts.

Q. (By Mr. BOE) Was the information appearing in this Exhibit No. 7 drawn from the books and records of The Chicago, Rock Island & Pacific Railway Company, kept in the usual course of business, Mr. Smith?

A. Yes, sir.

Q. And the statement is prepared in accordance with the regulations and classifications prescribed by the Interstate Commerce Commission, is that true?

A. Yes, sir.

Mr. BOE: I offer Exhibit No. 7 in evidence.

Exam. HIGGINS: Any objection, Mr. Shields?

Mr. SHIELDS: No objection.

Exam. HIGGINS: Exhibit No. 7, consisting of six sheets, each of which has been identified by the witness, will be received in evidence with the same marking, Witness Smith.

(Applicant's Exhibit 7, Witness Smith, received in evidence.)

Exam. HIGGINS: You may cross examine the witness.

Mr. SHIELDS: No cross examination.

Exam. HIGGINS: The first sheet showing the profit and loss represents the trustees' account as distinguished from corporation records?

Mr. BOE: Of Exhibit 7?

Exam. HIGGINS: Yes, the first sheet of Exhibit 7.

The WITNESS: That is our general profit and loss statement as of that date. It does not conform particularly as to the trustees' account.

Q. (By Exam. HIGGINS) It shows profit and loss for 1935 and 1936 and up to and including August 31, 1937?

363 A. Yes, sir, that is the profit as of that date, which is also prior to the organization proceedings June 7, 1933.

Exam. HIGGINS: I see, and this first sheet represents the trustees' account after that period for the two full years and the period up to June 7, 1933, is that true?

Mr. BOE: Yes.

Exam. HIGGINS: There is a gap between the June 7, 1933, and the account of 1935?

Mr. BOE: Yes.

Exam. HIGGINS: So it is just the trustees' account?

Mr. BOE: Purely the trustees' account.

Exam. HIGGINS: And your two years represent the financial statement of the corporation for the two full years and the eight full months up to August 31, 1937?

The WITNESS: That is the trustees' account.

Exam. HIGGINS: Is that also the trustees' account?

The WITNESS: Yes, sir.

Mr. BOE: Yes, that is the trustees' account. You will see, your Honor, that is restricted to the years 1935 and 1936, and the eight months of 1937, during which period the trustees were in control of the property.

Exam. HIGGINS: I am just trying to find out if there is any duplication between sheets 1 and 2.

Q. (By Mr. BOE) Can you explain that, Mr. Smith?

Exam. HIGGINS: And your income statement.

364 Mr. BOE: The profit and loss is the first sheet and the other is income.

Exam. HIGGINS: For the same identical period, and both trustees' account?

The WITNESS: Yes, sir.

Mr. BOE: Both trustees' account, yes, sir.

Q. (By Exam. HIGGINS) Can you explain the investments

in affiliated companies on the general balance sheet as of August 31, 1937?

A. I haven't got that with me.

Q. What are the affiliated companies, the Rock Island Motor Transit Company?

A. Yes, the Choctaw, Oklahoma & Gulf Railroad Company; Rock Island, Arkansas & Louisiana Railroad Company; St. Paul & Kansas City Short Line; and many of those subsidiary companies.

Q. And the last sheet shows contingent liabilities that are not shown in the prior balance sheet itself?

A. They are not shown in the balance sheet.

Q. You are setting them out separately? Is that the point?

A. Yes, sir, we have always done that.

Q. Tell me if the Rock Island Motor Transit Company is not operated, from what source does it get its income, if any?

A. They have not had any income.

Q. All those figures are intended to represent deficits right straight through?

A. That is right, they are.

Q. The deficit does not apply to the first year or the first period only?

A. No.

Exam. HIGGINS: Exhibit No. 7 will be received in evidence.

I might just say I notice on the giving effect balance sheet the railroad has a \$10,000 additional cash working fund proposed to be advanced by the trustees?

Mr. BOE: That is right.

Exam. HIGGINS: That will make an outlay of \$90,000 altogether, of which \$30,000 will come back from the Stone notes?

Mr. BOE: That is right, yes, sir.

Exam. HIGGINS: Any further questions?

(No response.)

Exam. HIGGINS: You are excused, Mr. Smith.

(Witness excused.)

Mr. BOE: I will call Mr. Kinsey.

M. R. KINSEY was sworn and testified as follows:

Direct Examination.

Q. (By Mr. BOE) State your name and address, please.

A. M. R. Kinsey, Des Moines, Iowa.

Q. And what is your business or occupation?

A. I am an auditor for the White Line Motor  
366 Freight and White Line Transfer & Storage and the  
White Line Trucking Company.

Q. How long have you been employed by those companies?

A. Since June 17, 1937.

Q. You have charge of keeping the books and accounts for those three companies you have named?

A. I do.

Q. Showing you exhibits marked for identification Exhibits 8 to 19, inclusive, I will ask you if they were prepared by you or under your supervision and direction?

A. They were.

Q. From what source were they prepared?

A. From the books and the record and from the audit reports from Wolf & Company that we keep in the office.

A. They were derived from the books and records kept in the companies' office in the usual and regular course of business?

A. Yes, sir.

Q. And you said also from some records prepared by Wolf & Company?

A. Yes, sir.

Q. Who is Wolf & Company?

A. They are certified public accountants who have an office in Des Moines.

Q. And what does Wolf & Company do at Des Moines, audit the accounts of the White Line companies?

A. Yes, sir.

367 Q. Will you identify these various exhibits that I have handed to you?

Exam. HIGGINS: And it will be very convenient, as you go along, especially as you come to the profit and loss statements, to give me the figure of the deficit or income covered by each statement.

The WITNESS: All right. Exhibit No. 8, sheets No. 1 and No. 2, are the assets and liabilities of the White Line Motor Freight Company for twelve months ending December 31, 1935.

Sheets 3 and 4 are the income and expenses or profit and loss statement for the same period, and that shows an income of \$4,451.87.

Mr. BOE: I will offer in evidence Exhibits 8 to 19, inclusive.

Exam. HIGGINS: The sheets just identified by the witness, all of which are clipped together, will be received in evidence as Applicant's Exhibit No. 8.

(Applicant's Exhibit 8, Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 9, sheets No. 1 and No. 2, is an assets and liabilities statement of the White Line Motor Freight Company, Incorporated, for six months, ending June 30, 1936.

Sheets No. 3 and No. 4 are a profit and loss statement of the same company, and shows a deficit for that 368 period, as I have it here in red, of \$25,848.46.

Sheet No. 5 of the same exhibit is a deficit statement covering the same company and the same period.

Exam. HIGGINS: The deficit as of June 30, 1936, on that statement has been increased to \$33,816.06, has it not, as against your \$25,848.46?

The WITNESS: Well, yes, but they are making an adjustment on reserve in there of \$17.36.

Exam. HIGGINS: Which would be the proper figure for that deficit, the proper figure to quote?

The WITNESS: Well, you are right there, the proper figure would be \$25,865.82.

Exam. HIGGINS: \$25,865.82?

The WITNESS: Yes, with \$17.36 added to that figure.

Exam. HIGGINS: I see. The sheets just identified by the witness, consisting of five, which are bound together, will be received in evidence as Applicant's Exhibit No. 9, Witness Kinsey.

(Applicant's Exhibit 9, Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 10, sheet No. 1 and sheet No. 2, are the assets and liabilities for the White Line Motor Freight Company, Inc., for twelve months ending June 30, 1937.

Sheets Nos. 3 and 4 are the profit and loss statements for the same company and same period of time, showing a net loss, as shown in red figures, of \$25,246.38. 369

Sheet No. 5 shows a deficit statement, showing net loss of \$27,824.93.

Exam. HIGGINS: Is that the proper figure?

The WITNESS: That is the proper figure.

Exam. HIGGINS: The five sheets, just identified by the witness, all of which are clipped together, will be received in evidence as Applicant's Exhibit No. 10, Witness Kinsey.

2. (Applicant's Exhibit 10, Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 11, sheets No. 1 and No. 2, are the assets and liabilities of the White Line Motor Freight Company, for four months ending October 31, 1937.

Sheets Nos. 3, 4 and 5 are the profit and loss accounts for that same period, showing a net loss of \$2,977.72.

Exam. HIGGINS: The five sheets just identified by the witness, and which are clipped together, will be received in evidence as Applicant's Exhibit No. 11.

(Applicant's Exhibit 11, Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 12—

Exam. HIGGINS: As a matter of fact, you did not have a balance sheet for two months?

The WITNESS: Well, your assets and liabilities is your balance sheet.

370 Exam. HIGGINS: If you stretched it over four months you would have all sorts of different figures, would you not?

The WITNESS: That is right, but the profit and loss statement is for four months.

Exam. HIGGINS: I understand that, but I am questioning whether the balance sheet should be for four months.

The WITNESS: You are right there, that should be "as of".

Exam. HIGGINS: The fact is, then, that with the exception of one year, this line has constantly lost money?

The WITNESS: Yes, sir.

Q. (By Exam. HIGGINS) In 1935 about \$4,000?

A. Yes.

Q. And do I understand this line conducts all of the operations of the White Line Motor Freight Company and not necessarily just between Omaha and Chicago?

A. It operates all of them.

Q. It includes the general operations, and is not intended to refer to the routes and rights and physical property between Chicago and Omaha?

Mr. BOE: You did not segregate them, did you?

The WITNESS: No, I did not segregate them at all. They are not segregated at all.

Exam. HIGGINS: All right. All current assets, including some furniture and fixtures, are shown as of October 31, 1937, at about \$42,000, are they not?

371 The WITNESS: Yes, sir.

Q. (By Exam. HIGGINS) And the property assets at about \$12,710.00?

A. Yes.

Q. Is all of that going to the application if this application is approved, or is some of it going to Mr. Stone?

A. The property assets are not going to the Rock Island Motor Transit; they cover the garage building and garage tools and equipment.

Q. The Motor Freight Line considered from a book-keeping standpoint, at any rate, with its equipment, assets and this depreciated value, was worth about \$42,000?

A. Yes, sir.

Q. All right.

A. Now, we are on the White Line Trucking Company, and Exhibit No. 12, sheet No. 1 shows the assets and liabilities of the White Line Trucking Company for twelve months as of December 31, 1935; sheet No. 2 shows the profit and loss statement for twelve months ended December 31, 1935, or a net profit of \$791.70.

Exam. HIGGINS: It lost \$1107 approximately for the month of December, 1935, but for the whole year it had a profit of \$792, in round figures?

A. That is right.

Exam. HIGGINS: The two sheets just identified by 372 the witness, will be received as Applicant's Exhibit No. 12.

(Applicant's Exhibit 12. Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 13, sheet No. 1, shows the assets and liabilities of the White Line Trucking Company as of June 30, 1936; sheet No. 2 shows the profit and loss statement for six months ended June 30, 1936, or a net loss of \$330.75.

Exam. HIGGINS: The two sheets just identified by the witness will be received in evidence as Applicant's Exhibit No. 13.

(Applicant's Exhibit 13. Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 14, sheet No. 1, is the assets and liabilities of the White Line Trucking Company as of June 30, 1937.

Sheet No. 2 is the profit and loss statement for the White Line Trucking Company as of June 30, 1937, and on that it shows a loss of \$5,484.59; sheet No. 3 is a deficit statement

of the same company in the same time, and it shows a net loss of \$5,854.29.

Exam. HIGGINS: Is that the figure to refer to to show the loss?

The WITNESS: Yes, sir.

Exam. HIGGINS: The three sheets, just identified  
373 by the witness, all of which are clipped together, are received in evidence as Applicant's Exhibit No. 14, Witness Kinsey.

(Applicant's Exhibit 14, Witness Kinsey, received in evidence.)

The WITNESS: Exhibit No. 15, sheet No. 1, shows the assets and liabilities of the White Line Trucking Company as of October 31, 1937. Sheet No. 2 shows the profit and loss statement for four months, ended October 31, 1937, or a net gain of \$72.97.

Exam. HIGGINS: Now, the balance sheet as of October 31, 1937, shows equipment assets at a depreciated net book value of \$2,791.82?

The WITNESS: Yes, sir.

Exam. HIGGINS: Is that passing to the applicant or will it, if the application is approved?

The WITNESS: Yes, sir.

Exam. HIGGINS: Any other assets on that sheet?

The WITNESS: No, sir.

Exam. HIGGINS: So that your assets would be a combination of the other figure \$41,000, plus the \$2,791.82?

The WITNESS: Yes, sir.

Mr. HURLBURT: There are some miscellaneous figures, I believe, were not included.

Exam. HIGGINS: I think we have some testimony that the physical property was worth approximately \$50,000  
374 irrespective of any operating rights, is that true at the present time, do you know?

Mr. BOE: I think that is right.

Exam. HIGGINS: Very well, the two sheets, just identified by the witness, which are clipped together, are received in evidence as Applicant's Exhibit No. 15.

(Applicant's Exhibit 15, Witness Kinsey, received in evidence.)

The WITNESS: We come now to the White Line Transfer & Storage Company statements.

Exam. HIGGINS: With respect to those other items, since they are not particularly involved except by way of incidental relationship with the contract, that is to say, the

White Line Transfer & Storage Company, I think we can just receive them in evidence under their respective exhibit markings.

Exhibit No. 16, consisting of six sheets, bound together, relating to the 1935 financial condition, and operating results of the Transfer & Storage Company will be received in evidence.

(Applicant's Exhibit 16, Witness Kinsey, received in evidence.)

Exam. HIGGINS: Exhibit 17, consisting of six sheets, showing the balance sheet and profit and loss statement for the six months ended June 30, 1936, and the earned surplus statement, all of which are clipped together, 375 is received in evidence as Exhibit No. 17.

(Applicant's Exhibit 17, Witness Kinsey, received in evidence.)

Exam. HIGGINS: Exhibit 18, consisting of six sheets, of the White Line Transfer & Storage Company, showing the balance sheet as of June 30, 1937, and profit and loss statement for twelve months ended June 30, 1937, and surplus statement, all of which are bound together, will be received in evidence as Applicant's Exhibit 18.

(Applicant's Exhibit 18, Witness Kinsey, received in evidence.)

Exam. HIGGINS: And four sheets consisting of balance sheet as of October 31, 1937, and profit and loss statement for the four months ended October 31, 1937, of the White Line Transfer & Storage Company, will be received in evidence as Applicant's Exhibit No. 19.

(Applicant's Exhibit 19, Witness Kinsey, received in evidence.)

Mr. BOE: I have no further questions on direct examination of this witness.

Mr. SHIELDS: No cross examination.

Exam. HIGGINS: I think the record ought to show the physical property is going to the Transfer & Storage Company and further show that Mr. Stone is going to assume the liabilities of the Motor Freight and the Trucking Company, and is going to receive certain accounts receivable, and himself assume the payments. 56

Mr. BOE: That is right, and that is specifically referred in the agreement submitted to the Commission for approval.

Exam. HIGGINS: All right.

Mr. BOE: That concludes this witness' testimony.

Exam. HIGGINS: You are excused. •

(Witness excused.)

Mr. BOE: The applicant rests.

Exam. HIGGINS: Is there any testimony to be offered by protestants?

Mr. SHIELDS: Not on the part of this protestant.

Exam. HIGGINS: Let the record show then that not any of the other protestants, if any there were, are here present.

Mr. BOE: No response.

Exam. HIGGINS: No response. Is there anything further to come before the Examiner?

Mr. BOE: Nothing further.

Exam. HIGGINS: Mr. Shields?

Mr. SHIELDS: No, sir.

Exam. HIGGINS: Anyone desire to file briefs?

Mr. BOE: I don't think so.

(Discussion outside the record.)

Mr. SHIELDS: I would like time to determine whether I would like to file a brief or not.

377 Exam. HIGGINS: I will set the brief date. Thirty days from today; that would allow ten days to get the transcript and twenty days after you get it. That will be December 18th, and I will ask you to notify us as quickly as you can, as well as the other parties, whether or not you intend to file a brief.

Mr. SHIELDS: Do you wish to limit us as to the time of notification?

(Discussion outside the record.)

Exam. HIGGINS: I will give you a week, and you will notify the Commission and the parties if you desire to file a brief.

If there is nothing further, the hearing is closed.

(At 8:00 o'clock p.m., November 19, 1937, hearing closed.)

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## INTERSTATE COMMERCE COMMISSION

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, *et al.*

*Report and Order Recommended by John S. Higgins,  
Examiner, Section of Finance, Bureau of  
Motor Carriers.*

Served February 12, 1938.

## NOTICE TO PARTIES

Exception, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 20 days from date of service shown above, or within such further period as may be authorized for the filing of exceptions. Otherwise, at the expiration of said period for the filing of such exceptions, the attached order will become the order of the Commission and will become effective unless the order has been stayed or postponed by the Commission.

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## INTERSTATE COMMERCE COMMISSION

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, *et al.*

Submitted ..... Decided .....

Purchase by The Rock Island Motor Transit Company of certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, approved and authorized. Conditions prescribed:

*Harry E. Boc* for applicant and rail carrier.

*W. B. Hurlburt* for vendors.

*Floyd F. Shields, C. R. Olson, and George E. Ward* for protestants.

*J. J. Brady, E. R. Brillhart, T. P. Scanlan, Fred C. Mager, and James A. Gillen* for intervenors and interested parties.

*Report and Order Recommended by John S. Higgins,  
Examiner, Section of Finance, Bureau of  
Motor Carriers—Filed Feb. 12, 1938*

By application filed October 13, 1937, The Rock Island Motor Transit Company seeks authority under section 213, Mo-

tor Carrier Act, 1935, to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, hereinafter called Motor Freight and Trucking Company, respectively, for \$59,400, of which not to exceed \$9,400 represents indebtedness against certain equipment to be acquired, which applicant agrees to assume. As an incident to the above transaction, control of White Line Transfer & Storage Company, hereinafter called Storage Company, is to be acquired by Lawrence E. Stone, under circumstances, hereinafter explained, which do not require approval by this Commission.

In accordance with the provisions of the act the application was referred to the examiner for hearing and recommendation of an appropriate order thereon. Hearing has been held, at which certain motor and rail carriers filed appearances, but offered no evidence. Briefs were filed.

381 Applicant<sup>1</sup>, an Illinois corporation, authorized to engage in transportation by motor vehicle but not now operating as a motor carrier, is a wholly owned subsidiary of The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees), hereinafter called Rock Island.

Motor Freight and the Trucking Company, Iowa corporations, operate, so far as the rights involved in this proceeding are concerned, as carriers of property by motor vehicle over the same highway between Chicago, Ill., and Omaha, Nebr., approximately 500 miles, via East Moline, Moline, Rock Island, Ill., and Davenport, Des Moines, and Council Bluffs, Iowa, with minor routes to Muscatine and Cedar Rapids, paralleling generally the lines of the Rock Island between these points, except that between Chicago and East Moline, approximately 200 miles, the motor routes are 20 to 25 miles removed from the line of the Rock Island at the farthest point. Routes of the Motor Freight east of Chicago are the subject of a separate application<sup>2</sup>, and such irregular routes or contract rights which the Trucking Company may possess under its "grandfather" application and which applicant may acquire will be disposed of or abandoned by applicant. It is the

<sup>1</sup> Has application pending in No. MC-F 468, Rock Island Motor Transit Company—Purchase—Burlington Transportation Company.

<sup>2</sup> Involved in No. MC-F 394, W. E. Bell—Purchase—White Line Motor Freight Company, Incorporated.

latter's stated purpose to utilize only those common carrier rights which Motor Freight and Trucking Company may possess between Chicago and Omaha which serve points on the line of the Rock Island and whatever duplication in such rights may occur is to be extinguished. The Storage Company, an Iowa corporation, engages principally in local storage and transfer business in Des Moines and also hauls household goods and heavy loading machinery in over-the-road service. All three companies have pending "grandfather" applications.

Motor Freight, the Trucking Company, and the Storage Company are controlled through stock ownership except directors' qualifying shares, by Mrs. May E. Mills, widow of their founder, Pleasant J. Mills. Mrs. Mills, lacking business experience, and to relieve herself of responsibility, desired to dispose of the above companies as a unit and accordingly gave to Lawrence E. Stone, an executive official thereof, an option on her stock, which expires April 1, 1938. Trustees of the Rock Island were subsequently authorized by court order entered October 4, 1937, to execute, or cause applicant herein to execute, agreements for the purchase from Stone, of the properties of Motor Freight and the Trucking Company.

By agreement with applicant dated October 4, 1937, Stone, as a condition to taking effect of such agreement, was to procure the deposit of all the outstanding shares of stock of the 3 companies with an escrow agent, and by contemporaneous escrow agreement by and between Mrs. May E. Mills, applicant, Stone, and such agent, Valley Savings Bank, Des Moines, there was deposited with the latter 400 shares of stock of Motor Freight, 205 shares of stock of Trucking Company, and 575 shares of stock of Storage Company, constituting, respectively, all their outstanding capital stock, and applicant deposited with such agent the sum of \$80,000, which had been advanced to it by the Rock Island. The escrow agreement provides, in part, that if on or before April 1, 1938, certain events specified therein occur, unless the parties agree in writing to the disposition of the properties without awaiting such events, with notice to the agent, the latter will pay Mrs. Mills the above sum, and will deliver to Stone the stock of Motor Freight and the Trucking Company, and deliver to applicant the stock of the Storage Company as security for an advance to Stone, hereinafter explained. Upon delivery of the stock of Motor Freight and the Trucking Company to Stone, the

latter agrees to call a meeting of the respective stockholders and proceed to dissolve said corporations. In connection with this dissolution, Stone shall cause Motor Freight and the Trucking Company to transfer to him all their assets, in consideration of his assumption of their liabilities, excluding \$9,400 indebtedness against certain equipment which applicant agrees to assume. The sum of \$30,000 of the total purchase money was considered as an advance by applicant to Stone to permit the latter to effect the transaction, and acquire control of the Storage Company, and when the stock of the latter is delivered by the escrow agent to applicant as collateral for such advance, Stone concurrently agrees to repay applicant the sum advanced evidenced by 4 promissory notes, bearing interest at the rate of 5 percent per annum, payable semi-annually. Applicant has the right, in default of principal or interest, to vote such stock, but upon payment of said notes, the stock will be released to the record owner. Numerous other provisions relating to conditions under which the contract is to become effective, damage, insurance, State taxes, maintenance of equipment, and restrictions on the Storage Company's operations in competition with applicant, are specifically recited therein and need not be here repeated. Stone does not control a motor carrier and undertook to accomplish the foregoing transaction in the manner indicated in order that the three properties might be disposed of as a unit. Pursuant to the foregoing, applicant will expend 50,000 for the rights and property of Motor Freight and the Trucking Company, excluding indebtedness assumed. Any difference between the amount of \$9,400 assumed by applicant and the actual indebtedness as of date of conveyance of the equipment shall be credited one-fourth on each of four notes given by Stone, who will be further credited upon his debt to applicant with any license fees for the year 1938 which he pays or causes to be paid by Motor Freight and the Trucking Company. For such expenditure, if the application is approved, applicant will receive State certificates and permits, specifically designated in the agreement; whatever interstate rights Motor Freight and the Trucking Company may obtain pursuant to their respective "grandfather" applications; good will and the exclusive right to use the name "White Line" when not in combination with "Transfer and Storage". In addition, it will receive certain physical property, except garage tools and equipment located at Des Moines, consisting principally of approxi-

mately 130 motor vehicles with an estimated replacement cost of \$50,000, and a depreciated ledger value of approximately \$44,786 as of October 31, 1937.

The Rock Island's balance sheet as of August 31, 1937, shows assets of \$503,209,452, including current assets \$23,981,846. Liabilities include current liabilities \$248,519,913. Income statements for 1935, 1936, and 1937, first 8 months of 1937, show deficits of \$15,023,571, \$13,380,980, and \$6,831,161, respectively.

Balance sheet of Motor Freight as of October 31, 1937, shows total assets of \$90,034, consisting of: Current assets \$29,323, including due from connecting carriers \$9,927, accounts receivable, less reserve for bad debts \$8,103, e. o. d.'s receivable \$6,242, and material and supplies \$2,775; carrier-operating property, less depreciation, \$54,705; advances to employees \$544; and prepayments \$5,462. Liabilities were: Current liabilities \$112,802, including due Storage Company \$68,972; accounts payable \$10,195, due connecting lines \$10,171, and accrued taxes and insurance \$7,526; reserve for claims \$515; Midway Transit Co. \$500; capital stock \$40,000; and surplus (debit balance) \$63,783. Income statement for 1935 shows net income, after provision for Federal income taxes, of \$3,727, and statements for 6 months ended June 30, 1936, 12 months ended June 30, 1937, and 4 months ended October 31, 1937, show deficits of \$25,527, \$26,069 and \$3,304, respectively.

Trucking Company's balance sheet as of October 31, 1937, shows total assets of \$14,526, consisting of: Current assets \$11,554, principally accounts receivable; carrier-operating property, less depreciation, \$2,792; and deferred debits \$180. Liabilities were: Current liabilities \$307; capital stock \$20,000, and surplus (debit balance) \$5,781. Income statement for 1935 shows net income, after provision for Federal income taxes, of \$801, and statements for the 6 months ended June 30, 1936, 12 months ended June 30, 1937, and 4 months ended October 31, 1937, show deficits of \$331 and \$5,485, and net income of \$73, respectively.

Applicant's balance sheet as of November 15, 1937, giving effect to proposed transaction, shows total assets of \$103,950, consisting of: Cash working fund proposed to be advanced by the Rock Island \$10,000; notes receivable—L. E. Stone \$30,000; investments and advances—Rock Island \$3,445; cost of acquiring Motor Freight and the Trucking Company \$59,409; and incorporation fees and other expenses \$1,105. Liabilities were: Non negotiable debt

to Rock Island \$90,000; equipment purchase contracts payable \$9,400; capital stock \$10,000; and surplus (debit balance?) \$5,450.

As a result of loss of less-than-carload traffic by the Rock Island, and in order to improve the former's present service, applicant intends to use the operating rights acquired in serving points located on the line of the Rock Island between Chicago and Omaha for 3 methods of operation, (1) a coordinated rail-truck service, at rail rates, auxiliary to existing all-rail service by moving merchandise cars to certain set-out points, and completing delivery to destination by truck; (2) an all-truck service under rail rates and billing on short hauls between stations where feasible and economical as a substitute for rail service; and (3) an all-truck service restricted to points on the line of railroad at rates comparable with those of motor competitors.

Considerable testimony was introduced by applicant's traffic and operating witnesses showing the manner in which a correlated rail-truck service would expedite and improve present all-rail service to intermediate points between the above cities. By way of illustration, a traffic official of the Rock Island testified that all-rail service from Chicago to such points as Durant, West Liberty, Tiffin, and Marengo, Iowa, requiring approximately 38 to 41 hours, could be expedited as much as 24 hours if Chicago tonnage were moved by rail to a set-out point, Silvis, Ill., for example, and trucked beyond to these points and a similar arrangement is proposed on east-bound tonnage out of Omaha. In instances where all-truck service is shown to be superior to an all-rail service, especially on short hauls, station to station, for example, between Davenport and Wilton Junction, Iowa, applicant proposes to render truck service at rail rates and under rail billing without relationship to any rail movement, and further proposes, as an example of the third method, an all-truck service between Chicago and Omaha, at competitive truck rates. Personnel and facilities of the Rock Island are to be made available to the proposed operation and present handling of c.o.d. shipments and loss and damage claims improved, and while no detailed estimates were furnished showing the monetary savings expected, opinion was expressed that operating economies would result, principally from decreased use of rail merchandise cars. Various advantages resulting from the proposed service was recited by representatives of various business organizations and shippers located along the route. The ex-

penditure proposed bears a reasonable relationship to the properties acquired and expected benefits therefrom and the presence of other rail and motor carriers in the territory precludes any possibility of undue restraint of competition.

Protestants urge denial of the application because applicant has not described with sufficient exactitude the precise plan or manner in which it proposes to correlate rail-truck service or resulting economies; the financial condition of the companies here involved and the competitive situation in the territory does not justify the purchase in the public interest; and rail-truck coordination may be accomplished by the railroad through use of independent motor lines. The proposed rail-truck coordination was sufficiently described both generally and by typical examples, to justify approval thereof, subject to the conditions and restrictions hereinafter imposed and there is no prohibition in the Motor Carrier Act, 1935, against a railroad undergoing reorganization acquiring motor lines, provided it meets the required statutory proof. Denial of the application because of the competitive conditions existing would leave the parties subject to such conditions and deprive the public of improved rail-truck service; to the detriment of all. Undoubtedly, coordination may be accomplished by a rail carrier through use of independent truck lines but it can not be compelled to use such arrangement contrary to its will and, so far as this particular proceeding is concerned, the evidence is that better results can be obtained if the motor lines here involved are directly controlled by the railroad. These contentions must be rejected.

Protestants further urge, in event the application is approved, that applicant should, following *Pennsylvania Truck Lines, Inc., Acquisition of Control*, 1 M.

387 C. C. 101, 5 M. C. C. 9 and 49, be precluded from engaging in truck service which has no direct relationship to rail movement whether such service is rendered under rail or competitive motor rates. Motor operations by a rail subsidiary which otherwise compete with the railroad itself were among those disapproved in the above decision, but upon the premise that the proposed all truck service at rail rates and rail billing for station-to-station short hauls will be non-competitive as to such rates and a substituted superior service by use of a different instrumentality (truck for rail-car) provisional authority for such service should be granted, subject to restrictions or modifications which may result from determination of similar proposals pend-

ing before this Commission on reopened hearing<sup>2</sup> in *Pennsylvania Truck Lines, Inc.—Control—Alko Exp.*, 5 M. C. C. 77, or such further modifications or restrictions as may become necessary. Nothing herein contained, however, is to be taken as authorizing applicant to engage in all truck service at competitive motor rates.

The general plan for correlated rail-truck service is somewhat similar in character to that described in *Pennsylvania Truck Lines, Inc., Acquisition of Control*, *supra*, and leads to the same conclusions in respect thereto. The Commission there approved the acquisition of a motor-truck line by a railroad subsidiary but conditioned its approval and authorization to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad in order to protect the traffic rights of competing common carriers at points not previously served by the railroad. A similar condition will be imposed herein and the findings will further provide that applicant shall not engage in motor service at competitive motor rates; that it shall not conduct any contract or irregular route operations in event such rights may be acquired herein and that it shall not vote the stock of White Line Transfer & Storage Company now pledged with it, in event of default, as provided in the agreement, unless it receives specific authority from this Commission.

388 The examiner finds that purchase by The Rock Island Motor Transit Company of properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, including the right to operate pending determination of the respective "grandfather" applications of these companies and the right, so far as operating rights the transfer of which is herein authorized are concerned, to any certificates which may be issued as a result of said applications, upon the terms and conditions set forth in the title application, except as hereinafter modified, which terms and conditions are found to be just and reasonable, will promote the public interest by enabling The Chicago, Rock Island and Pacific Railway Company to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition, and that the conditions of section 213 of the act have been or will be fulfilled; *Provided, however*,<sup>3</sup> that the authority herein granted (1) is subject to the limitation that applicant shall not render service from or to, or interchange traffic at, any point other than a station on the

lines of The Chicago, Rock Island and Pacific Railway Company, and shall be subject to such further limitations as it may hereafter be further necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition; (2) that no truck service shall be conducted at other than rail rates; (3) that no contract or irregular route operations shall be conducted pursuant to the rights acquired, and (4) that neither applicant nor the railroad, their directors, officers, or agents, shall directly or indirectly vote the stock of White Line Transfer & Storage Company, without specific authority from this Commission.

An appropriate order, in the form attached, should be entered.

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Recommended by John S. Higgins,  
Examiner, Section of Finance  
Bureau of Motor Carriers.

JOHN S. HIGGINS

John S. Higgins (Signature)

#### ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C.,  
on the                      day of                      A. D. 1938.

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, *et al.*

IT APPEARING, That the above-entitled matter was duly referred, pursuant to the provisions of section 205, Motor Carrier Act, 1935, for hearing and recommendation of an appropriate order; that upon due notice a public hearing was held; that a recommended order with accompanying report containing the findings of fact and conclusions thereon was duly filed and served, which report is made a part hereof:

IT IS ORDERED, That purchase by The Rock Island Motor Transit Company of operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, upon the terms and conditions set forth in the findings in said report, be, and it is hereby approved and authorized.

IT IS FURTHER ORDERED, That if the parties to the transaction herein authorized desire to consummate same, they shall notify this Commission of their intention so to do, in writing, prior to the consummation thereof, and promptly take such further steps as will insure compliance with sections 215, 217, and 221 of the act, and with the rules, regulations and requirements promulgated thereunder.

IT IS FURTHER ORDERED, That recital in the accompanying report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

IT IS FURTHER ORDERED, That before recording the purchase upon its books, applicant shall submit, in triplicate, the related journal entries to our Bureau of Motor Carriers for approval.

AND IT IS FURTHER ORDERED, That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the Motor Carrier Act, 1935, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL  
Secretary.

(SEAL)

### 394 Before the Interstate Commerce Commission

In the matter of the application of The Rock Island Motor Transit Company, a corporation, for authority to acquire properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, corporations.

Docket No. MC F-445.

#### *Exceptions in Behalf of Applicant—Filed March 3, 1938*

Now comes applicant, The Rock Island Motor Transit Company, and excepts to the report and order recommended by Examiner John S. Higgins, and in support of its exceptions applicant respectfully shows:

Applicant excepts to the recitals in the examiner's report, appearing in the first paragraph of sheet 8, reading:  
" \* \* \* but upon the premise that the proposed all-truck service at rail rates and rail billing for station-to-station short hauls will be noncompetitive as to such rates and a substituted superior service by

395 the use of a different instrumentality (truck for rail car), provisional authority for such service should be granted, subject to restrictions or modifications which may result from determination of similar proposals pending before this Commission on reopened hearing in *Pennsylvania Truck Lines, Inc. v. Control-Alko Express*, 5 M. C. C., or such further modifications or restrictions as may become necessary. Nothing herein contained, however, is to be taken as authorizing applicant to engage in all truck service at competitive motor rates.<sup>5</sup>

Applicant further excepts to the recital appearing in the second paragraph of sheet 8 of the recommended report of the examiner, reading:

"\* \* \* the findings will further provide that applicant will not engage in motor service at competitive motor rates."

And applicant excepts to the finding appearing in sheet 9 of the examiner's report, numbered (2), "that no truck service shall be conducted at other than rail rates."

396

#### ARGUMENT

*Restriction not warranted by the evidence.* The restriction that the applicant shall not engage in service at other than rail rates, as recommended by the examiner, is not supported by any evidence in the record in this proceeding. As stated in the examiner's report (sheet 6), and described by applicant's witness Davidson, applicant proposes to use the operating rights intended to be acquired for three methods of operation, *i. e.*,

(1) Highway carrier service at rates and charges comparable to those observed by highway competitors.

(2) Rail-truck coordinated service, to be performed at rail rates.

(3) A service, at rail carrier's option, which would enable substitution of truck service for rail service, at rail rates. (Witness Davidson; tr. 218.)

Neither the application filed by the applicant herein, nor the proceedings before the examiner, indicated that the applicant proposed to limit the use of trucks to a service at rail rates. As sound economy would dictate, the intention of the applicant, from the inception of negotiations, has been to be able to avail itself of maximum use of the physical properties and common carrier operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company, consistently with the provisions of the Motor Carrier Act, 1935.

397. None of the witnesses who testified in behalf of applicant, representing chambers of commerce and responsible shippers and receivers of freight, qualified their support of applicant's proposal to a restriction as to the use of rail rates as recommended by the examiner. On the contrary, these gentlemen, who are intimately acquainted with transportation problems in the affected territory and have a knowledge of the character and extent of carrier agencies engaged and services afforded in such territory, agreed that a motor carrier service in the respects suggested by the applicant would be of substantial public benefit without conflicting with any inhibitions in the Motor Carrier Act.

No evidence was offered by any pro testants, so that it can not be said, in so far as evidence from protestants might bear on the question, that any protestants showed that only rail rates in connection with the proposed service should be allowed.

There being no evidence in this record to sustain the recommendation and finding of the examiner to limit the rates to be charged to a rail rate basis, justification for such a limitation must be found outside of the record or in some requirement in the law. Applicant maintains that the Commission is not under a direct mandate, under the law, to impose such a restriction, nor that a proper interpretation thereof warrants such a restriction as a condition precedent to a railroad's acquisition of a motor carrier's rights and properties.

398. *Value of physical properties and operating rights proposed to be acquired will be seriously impaired.*

White Line Motor Freight Company and White Line Trucking Company are going concerns, the former having been organized in January, 1930, and the latter, in 1933, resulting from expansion of motor carrier activities arising in the business of White Line Transfer and Storage Company, which was founded in 1893, to conduct a local transfer and storage enterprise at Des Moines, Iowa. (Tr. 248, 249.) At the time of commencing negotiations White Line Transfer and Storage Company and White Line Trucking Company were, and they still are, conducting motor carrier transportation between Chicago, Illinois, and Omaha, Nebraska, extending through the Tri-Cities (Moline and Rock Island, Illinois, and Davenport, Iowa) and Des Moines, Iowa, with segments to Cedar Rapids, Iowa, and Muscatine, Iowa,—all being points on the line of railroad of the Chicago, Rock Island and Pacific Railway Company. Neces-

sarily, applicant took into account the character and extent of the business of White Line Motor Freight Company, Inc., and White Line Trucking Company, in the affected territory, in appraising the value of the physical properties and operating rights of these companies to the applicant and the trustees of The Chicago, Rock Island and Pacific Railway Company. It was expected that the applicant would be able to offer a service that would be superior to that presently afforded by these motor carriers, without undue restraint of competition, and with substantial benefit

399 to shippers and receivers of freight, conformably with the purposes and intent of the Motor Carrier Act, 1935. - The imposition of a restriction that the applicant shall not engage in motor service at other than rail rates, however, would have the practical effect of immediately diverting such a large volume of the present business of White Line Motor Freight Company and White Line Trucking Company as vitally to impair the value of the investment to the applicant. Instead of enabling the inauguration of an improved and superior service, the operations of the White Line properties would at once be converted to such a restrictive basis as not only to deprive shippers and receivers of freight of the contemplated service, but would confine the applicant to the difficult position of being unable to compete in a legitimate manner with other motor carriers, not affiliated with railroads, as well as those so affiliated and not subject to a similar restraint. Such a burdensome restriction was not in contemplation of the parties to the transaction, nor advocated by the shipping interests supporting this application, whose business is and would be directly involved. And such a restriction has not heretofore been exacted of other railroads or their affiliates with respect to similar acquisitions. *Pennsylvania Truck Lines, Inc.*, 1 M. C. C. 101, 5 M. C. C. 9; *Texas & Pacific Motor Transport Co.*, 5 M. C. C. 89; *Burlington Transportation Co.—Purchase of Bell Transfer, Inc.*, M. C.—F-365, decided Dec. 13, 1937; *Santa Fe Trail Transportation Co.—Control of Western Transit*  
400 *Co.*, 5 M. C. C. 81; *Same—Control of Rio Grande Stages*, 5 M. C. C. 17; *Same—Control of Rex Transfer Co.*, 5 M. C. C. 1; *Same—Control of Estep, et al.*, 5 M. C. C. 127.

That an improvement in service will result from the acquisition was abundantly demonstrated by the record. In the rendition of its present service, White Line has been handicapped by a lack of facilities in the transac-

tion of business. White Line maintains facilities at only Chicago, Davenport, Cedar Rapids, Newton, Des Moines and Atlantic, although undertaking to do business at numerous other points in the affected territory where no agents or facilities are maintained. (Tr. 252.) This inadequacy has circumscribed the development of White Line's business to its maximum efficiency. (Tr. 253.) Witness Stone, President of White Line, cited instances of limitations in the performance of its service resulting from inadequate facilities. (Tr. 253, 254, 255.) Contrasted to this is the evidence that the Rock Island maintains stations at approximately fifty points between Chicago and Omaha which would be available for expansion of motor carrier operations, to the obvious advantage of shippers and receivers of freight. (Tr. 270.) These advantages were recognized by witnesses who testified in behalf of applicant and who without exception favored the proposed acquisition.

In the present conduct of its business as a common carrier by motor vehicle, White Line Motor Freight Company,

Inc., participates in joint through arrangements with  
401 other motor carriers. It was anticipated that the

advantages of this privilege to patrons desiring to use applicant's service, as successor in interest to White Line's business, might be continued, and that the applicant in succeeding to the operating rights of White Line might be permitted to provide at least as comprehensive a common carrier service as had theretofore been afforded. The restriction that only rail rates may be applied would immediately prevent applicant from pursuing this course and would disrupt the transfer of the operating rights to the severe detriment of applicant without any compensating benefit to shippers and receivers of freight. Until shown to be prejudicial, unduly discriminatory, or otherwise inimical to the public interest, in an appropriate proceeding before this tribunal, the Commission should not decide, as a condition to the acquisition, that the applicant may not join with other motor carriers in the establishment of joint through routes and rates in the manner now practiced by White Line, or continue, in general, the common carrier business as now conducted by it.

*Rate issue not involved.* This is not a rate case, and it is respectfully submitted that the subject of rates is not an issue in a proceeding of this nature. It was not alleged by the applicant, nor claimed by any of the protestants, that rates were an issue to be herein determined. No protestant presumed to say that the reasonableness of rates intend-

ed to be charged for motor carrier service to be conducted by the applicant should be adjudicated in this proceeding. Reference to rates was incidental when alluded to by applicant's witness Davidson in his description of the service proposed to be offered by the applicant and the affiliated interests, i. e., the trustees of The Chicago, Rock Island and Pacific Railway Company.

So far as counsel for applicant was able to discover the Commission has not in any decided cases, under the finance docket of the Commission, held that the rate structure is involved in a proceeding under section 213 of the Motor Carrier Act, or that the Commission, in the absence of evidence in the record, should undertake to determine the reasonableness of a rate basis. No sound construction of section 213 requires the Commission to follow such a course. The ramifications of a rate inquiry are so complex and broad that in any proceeding to determine the reasonableness of rates the Commission has uniformly required pertinent and direct proof from parties in interest. No attempt was made by the applicant or any of the protestants to offer particular evidence relevant to any inquiry with respect to rates. The examiner's recitals and finding in this connection, consequently, amount to a determination as to the reasonableness of rates without any evidence on the subject in the record, which palpably would be inconsistent with precedent before the Commission and contrary to law.

*Barker principle inapplicable.* It is respectfully urged that the rule announced in *Pennsylvania Truck Lines, Inc.*,

*Acquisition of Control of the Barker Motor Freight Line, Inc.*, 1 M. C. C. 101, 5 M. C. C. 9, should not be

so construed as to limit a motor carrier affiliated with a railroad, from the inception of operations, to conduct its business only at rail rates. Operations auxiliary or supplementary to the train service of the controlling railroad should not, at all events, be confined to rail rates. Any such construction is not compelled by an express mandate of the Motor Carrier Act, 1935, but would rather be in conflict therewith. The inescapable consequence of such a construction would be a denial of the right of a motor carrier, affiliated with a railroad, to provide the comprehensive service contemplated by the Act. Nor would it insure the preservation of inherent advantages of and sound economic conditions in transportation by motor carriers as contemplated by the Motor Carrier Act. Moreover, such a narrow construction would lead to the establishment of arbitrary inequalities among carriers wholly irrespective of public need

or justification. Specifically, motor carriers now affiliated with railroads, having established "grandfather" rights under section 206 (a) of the Motor Carrier Act, 1935, would be in one category, and such motor carriers commencing service subsequent to June 1, 1935, although, in the public interest, attempting to offer a competitive service, would be precluded from doing so. Had this been the intent of Congress in the enactment of the Federal Motor Carrier Act, such an arbitrary classification would not have been

404 left to any rule of construction but would have been accomplished by an express prohibition. The examiner's assumption, then, that the Barker principle was intended to restrict a railroad's operation of a motor carrier solely to the basis of rail rates is fallacious and if allowed to stand as a correct interpretation of the law, would defeat the purposes of the Motor Carrier Act and deny to common carriers by railroads benefits clearly intended thereby.

*Commission has jurisdiction as to rates.* Under Part I and Part II of the Interstate Commerce Act plenary jurisdiction is conferred upon the Interstate Commerce Commission in respect to rates of common carriers by railroad and by motor vehicle. By section 216 (b) of the Motor Carrier Act it is declared to be the duty of every common carrier of property by motor vehicle to establish, observe and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto; and by section 216 (c) of said Act it is provided that such common carriers may establish reasonable through routes and joint rates, charges and classifications *with other such carriers or with common carriers by railroad*. If the restriction as to the use of truck rates alone, as recommended by the examiner, should be imposed, applicant, although a common carrier by motor vehicle, would without hearing be enjoined from establishing reasonable through routes and joint rates, charges and classifications "with other such carriers," and seemingly, would be obliged to operate at rail rates, without regard to whether or not, as applied to motor carrier service, such rates are

405 just and reasonable within the meaning of section

216 (b) of the Motor Carrier Act. Such, apparently, would be the logical effect of a limitation as to rates, as recommended by the examiner,—manifestly in conflict with the cited provisions of the Motor Carrier Act which were not designed to accomplish such onerous or discriminatory results.

That the Commission, under Part I and Part II of the Interstate Commerce Act, may prescribe rates only after full hearing is not open to question. Note the first clause of paragraph (1) of section 15 of Part I:

"That whenever, *after full hearing*, \* \* \* the Commission shall be of opinion that any individual or joint rate, fare or charge \* \* \* is or will be unjust or unreasonable or unjustly discriminatory \* \* \* the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate \* \* \*." (Italics added.)

And note essentially similar language in paragraph (c) of section 216 of Part II:

"Whenever, *after hearing*, \* \* \* the Commission shall be of the opinion that any individual or joint rate, fare or charge \* \* \* by any common carrier or carriers by motor vehicle \* \* \* is or will be unjust or unreasonable, or unjustly discriminatory \* \* \* it shall determine and prescribe the lawful rate, fare or charge \* \* \*." (Italics added.)

In applying this statutory requirement for a hearing as to the reasonableness of rates the Supreme Court in  
406 *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, aptly remarked:

"All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." Citing *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14.

To the same effect was the Supreme Court's decision in *Pearia & Pekin Union Railway Company v. United States, Interstate Commerce Commission and Minneapolis & St. Louis Railroad Company*, 263 U. S. 528.

In *Atlantic Coast Line R. Co. v. Interstate Commerce Commission*, 194 Fed. 449, the Court thus discussed the question of procedure involving the Commission's power to prescribe a rate:

“By the plain language of the law the power of the Commission to prescribe a rate for the future cannot be exercised unless after full hearing on complaint made it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of the act for the transportation of persons  
 407 or property as defined in the first section of the act, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of the act. The word ‘opinion’ must be interpreted with reference to the connection in which it is used in the law. It is only after full hearing upon complaint made that the law gives any weight or significance to the opinion of the commission: that is, it is only when the opinion results from the full hearing that it can be used as the basis of further action by the commission. It is true that in making up the opinion of the commission its members may and it is their duty to call to their aid their knowledge and experience, but, *if Congress had intended that the commission could make up its opinion from the knowledge and experience of its members independent of any evidence in the particular case then it was idle to provide for a full hearing, as an opinion of the commission could be formed as well without as with the full hearing. A full hearing not only means an opportunity to be heard by the carrier, but an investigation by the commission itself of the lawfulness of the rate in question.*” (Italics added.)

It will thus be seen that while under powers conferred upon the Commission by Part I of the Interstate Commerce Act, and specifically by the provisions of section 216 of the Motor Carrier Act, any abuses, unjust discriminations or unduly prejudicial practices, with respect to rates and charges of motor carriers, and affiliated railroads, are subject to the corrective processes of the Commission either upon its own initiative or upon complaint of an interested party, a full inquiry relative thereto is  
 408 nevertheless contemplated by the law. Applicant maintains that no such abuses, unjust discriminations or prejudicial practices are indicated in the proposed acquisition. To assume that they are inherent therein, and that the transaction calls for the imposition of a restric-

tion as to rates, invokes a rule unnecessarily and unfairly extreme in its operation and effect. It amounts to a determination as to rates without evidence (none being in the record upon the point) and without the procedure designed by Part I and Part II of the Interstate Commerce Act for the establishment of just, reasonable rates and charges after inquiry into the merits of each case.

*Elimination of apparent conflict in methods of service.* Should the Commission believe that an unjustifiable conflict exists in two of the methods of service proposed to be offered, *i. e.*, (1) a motor carrier service, in substitution of rail service, at rail rates, and (2) a motor service at rates comparable to those offered by competing highway carriers, supplementary to the rail service,—applicant would suggest a limitation that where service is rendered entirely by motor truck, such service shall be deemed a motor carrier service for which rates and charges applicable to motor carrier service only shall be charged. This reservation would obviate any apparent conflict in the methods of service proposed to be rendered, and limit the application of rail rates to the so-called coordinated service, *i. e.*, where the movement is partly by rail and partly by motor vehicle.

409 In offering the methods of service referred to by Witness Davidson (Tr. 218), applicant felt that although transportation under rail billing, or motor billing, might be entirely by motor vehicle, incidents in the two methods of billing might not always be similar, and hence different rate bases were justifiable. Such incidents, under rail billing, involve the use of the rail uniform bill of lading and privileges as to reconsignment and storage not identical with motor billing; whereas incidents under motor billing might include privileges as to packing and crating differing from rail publications. These incidents, consequently, prompted the order of applicant, in collaboration with the trustees of The Chicago, Rock Island and Pacific Railway Company, to have available both methods of service where the movement would be entirely by truck. Adoption of the suggestion in the preceding paragraph, however, would eliminate any apparent conflict in rates or inequality to shippers.

## II

Applicant further excepts to the recital on sheet 8, and the finding on sheet 9, numbered (4), to the effect that neither applicant nor the trustees of The Chicago, Rock

Island and Pacific Railway Company, or their agents, shall directly or indirectly vote the stock of White Line Transfer and Storage Company without specific authority from the Interstate Commerce Commission.

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## ARGUMENT

By the agreement between applicant and the vendor (Lawrence E. Stone), the vendor agrees to pledge the capital stock of White Line Transfer and Storage Company with the applicant in order to insure the faithful performance of the terms and conditions of the agreement by the vendor. This contract is identified in the record as exhibit B-1-(a)-(1) to the application. If this transaction is consummated, it is contemplated that the vendor shall acquire the entire capital stock of White Line Transfer and Storage Company. As indicated by the record, White Line Transfer and Storage Company, a corporation, is the senior of the three corporations (White Line Motor Freight Company, Inc., White Line Trucking Company, and White Line Transfer and Storage Company) involved. Its business is essentially that of a local transfer and storage company in Des Moines, Iowa. By Article IV of this contract, the vendor agrees, among other things, to cause the the Transfer and Storage Company—

1. To secure the Rock Island in the advance of the sum of \$30,000.00 which vendor agrees to repay within four years after consummation of the transfer;
2. To quit-claim to the Rock Island any interests it may have in the properties of the Motor Freight Company and the Trucking Company;
- 411 3. To warrant the title of all property sold by the vendor to the Rock Island;
4. Not to maintain for a period of five years, any branch office at any location other than Des Moines, Iowa;
5. Not to engage in a common carrier service by motor vehicle competitive with the operating rights intended to be conveyed to the Rock Island.

It is clearly provided by the agreement that the applicant shall not engage in a local transfer and storage business in competition with vendor within the City of Des Moines, the sole object of the pledge of stock being to secure the applicant in the faithful discharge of obligations assumed by the vendor and in the repayment of the sum of money advanced as an incident to the transaction.

While it will be assumed that the applicant may anticipate the benevolent consideration of the Commission, should a breach of contract occur, or if applicant should be in jeopardy of sustaining a loss in the repayment of the amount advanced to the vendor, or a substantial part thereof, in which contingencies the need for prompt and effective measures might become imperative, practical difficulties in complying with the recommended limitation would immediately arise. The Commission might, in such a contingency, immediately grant its consent. It might, on the other hand, entertain a request from vendor, or from some third party, to inquire into the propriety of the proposal of the applicant to vote this stock. Without attempting to presume that the Commission will not accord its fullest cooperation, it is submitted that the restriction recommended by the examiner might operate to prevent applicant from acting with the dispatch and freedom that the circumstances may require with the possibility of a resultant material loss to the applicant.

If the condition recommended by the examiner that the stock of White Line Transfer and Storage Company should not be voted, unless specific authority from the Commission be first procured, is induced by an apprehension that the applicant, in acquiring control of White Line Transfer and Storage Company, might embark upon ventures inconsistent with the public interest, applicant would suggest a restriction that if such control should be acquired, as the result of the necessity of proceeding to protect itself against breach by the vendor, the applicant must (1) notify the Commission within ten days after acquiring such control, and (2) divest itself of such control within a reasonable time to be prescribed by the Commission. Such restrictions would not seriously impair applicant's right to security under the contract, and would reserve in the Commission full supervisory powers in the premises.

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#### CONCLUSION.

For the reasons assigned herein applicant submits that the examiner erred in recommending the imposition of the restrictions as to which these exceptions are filed. Applicant represents that the recommended restriction that it be permitted to acquire the operating rights and physical properties of White Line Motor Freight Company, Inc., and White Line Trucking Company, only if rail rates are applied in the performance of motor car-

rier service, is unwarranted and will so substantially impair the value of those physical properties and operating rights to the applicant and the trustees of The Chicago, Rock Island and Pacific Railway Company as to concern the propriety of the investment to which the applicant has tentatively been committed. Reluctantly, therefore, applicant will be obliged to conclude that, unless such a restriction be not imposed by the Commission as a condition precedent to acquisition, or unless a modification of such restriction as suggested by the applicant herein is acceptable, applicant must abandon this transaction. It does not seem that such a sacrifice is demanded by the public interest; certainly, not by this record. As reflected by the evidence, shippers and receivers of freight, who appeared in support of the acquisition, expressed unqualified approval. No voice of objection was raised by such interests. Considering the urgent need for carriers by railroad so to conduct their enterprises as to provide

414 adequate service and economical and efficient performance of business, a burdensome restraint of the nature recommended by the examiner would place insuperable obstacles in the way of achieving those salutary ends. Such, applicant submits, is not the purpose of the law.

Applicant urges, for the reasons specified, a removal of the restriction with respect to voting the stock of the White Line Transfer and Storage Company, or at least a modification thereof in the manner suggested by applicant. Elimination of such restriction, or modification in the manner proposed, would not circumscribe the supervisory jurisdiction of the Commission to correct any situation in connection with control of White Line Transfer and Storage Company that might be detrimental to the public interest.

Finally, applicant earnestly pleads for early consideration of these exceptions. The agreement of the parties to the pending transaction specifically requires consummation prior to April 1, 1938. In the absence of a decision by the Commission in advance of that date applicant will under this agreement be unable to avail itself of the benefits thereof should the Commission regard this transaction, as the applicant regards it, to be a provident one, and one where a motor carrier affiliated with a carrier by railroad, as well as a carrier by railroad, will be able to "promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage

in its operations and will not unduly restrain competition."

415 Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, join in these exceptions.

Respectfully submitted,

A. B. HOWLAND,  
HARRY E. BOE,

*Attorneys for Applicant, The Rock Island Motor Transit Company, and for Frank O. Lowden, James E. Gorman and Joseph B. Fleming, trustees of the estate of The Chicago, Rock Island and Pacific Railway Company.*

W. F. DICKINSON,  
J. G. GAMBLE,  
*Of Counsel*  
Chicago, Illinois.

March 2, 1938

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each such party.

Dated at Chicago, Illinois, the 2nd day of March, 1938.

HARRY E. BOE,  
*Of Counsel.*

No. MC-F-445

**ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.**

Submitted March 14, 1938.

Decided April 1, 1938

Purchase by The Rock Island Motor Transit Company of certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, approved and authorized, subject to conditions.

Harry E. Boe and A. B. Howland for applicant and controlling rail carrier.

W. B. Hulbert for vendor and controlled motor carriers.

C. R. Olson and Floyd R. Shields for motor-carrier protestants.

E. R. Brillhart, George M. Cummins, C. C. Crouse, James A. Gillen, T. P. Seanlan, H. F. Sundberg, and George E. Wiard for rail and motor-carrier interveners.

*Report of the Commission*

DIVISION 5, COMMISSIONERS EASTMAN, LEE AND ROGERS

By DIVISION 5:

Exceptions were filed by applicant, vendor, and certain intervenors to the order recommended by the examiner. Our conclusions differ somewhat from those recommended.

The Rock Island Motor Transit Company, by application filed October 13, 1937, seeks authority under section 213, Motor Carrier Act, 1935, to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company<sup>1</sup> for \$59,400 of which not to exceed \$9,400 represents indebtedness outstanding against certain equipment to be acquired in the transaction which applicant will assume. As an incident to the above transaction, control of White Line Transfer & Storage Company<sup>2</sup> is to be acquired by Lawrence E. Stone<sup>3</sup> under circumstances, hereinafter explained, which do not require our approval under section 213. Two motor  
419 carriers intervened in opposition to the application and various other such carriers and one rail carrier

<sup>1</sup> Herein called, respectively, White Freight, and White Trucking, and, collectively, White Lines.

<sup>2</sup> Herein called Storage.

<sup>3</sup> Herein called vendor.

either intervened or were represented at the hearing for the purpose of protecting their interests. None of these parties offered any evidence.

Applicant, an Illinois corporation, organized April 20, 1927, is controlled through ownership of its stock by Rock Island Improvement Company, a holding company, whose stock, in turn, is owned by The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees)<sup>4</sup>. Prior to October 19, 1932, it conducted intrastate motor-truck operations within Illinois but has not since engaged in any business, its operations having been suspended on that date by Illinois authorities. It has pending an application<sup>5</sup> under section 213 for authority to purchase operating rights between Des Moines, Iowa, and Minneapolis and St. Paul, Minn. Motor-vehicle operations are conducted by the railroad between St. Joseph and Kansas City, Mo., under contract with an independent trucking company, and are covered by a pending "grandfather" application. Several BMC-8 applications for authority to extend operations and one section—213 application<sup>6</sup> for authority to lease certain operating rights filed by the railroad are also pending.

White Lines, Iowa corporations, operate pursuant to pending "grandfather" applications as motor carriers of property in interstate or foreign commerce, White Freight operating as a common carrier over regular routes in Michigan, Indiana, Illinois, Iowa, and Nebraska<sup>7</sup>, and White Tracking operating as a common or contract carrier in the same and several other states. All of the capital stock of these companies and Storage, a motor carrier operating a local storage and transfer business in Des Moines  
420 and over-the-highway service hauling special commodities in several eastern and western States, is owned by May E. Mills, the aged widow of their founder, Pleasant J. Mills. Mrs. Mills lacking business experience, and having neither the physical capacity nor desire to continue the aforesaid operations, has sought for some time to

<sup>4</sup> Herein called the railroad.

<sup>5</sup> No. MC-E-468, Rock Island Motor Transit Company—Purchase—Burlington Transportation Company.

<sup>6</sup> No. MC-F-183, Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees)—Lease—Wm. F. Peterson.

<sup>7</sup> Operating rights between Chicago, Ill., and points in Indiana and Michigan and certain physical property are the subject of sale in No. MC-F-304, W. E. Bell—Purchase—White Line Motor Freight Company, Incorporated.

dispose of her holdings in the three companies as a unit, being unwilling to trade on any other basis. For this purpose she gave vendor, an official of each company and general manager of the entire enterprise, an option to purchase her stock, which option expires on April 1, 1938. The only purchase proposal received by vendor which conformed to the expressed instructions of Mrs. Mills was that of applicant herein, the latter being interested in obtaining common-carrier operating rights between Omaha, Nebr., and Chicago, Ill., including two side routes as hereinafter mentioned, alleged to be possessed by White Lines. Applicant is not interested in the operating rights of Storage, but to secure the rights of White Lines it was necessary to formulate some plan to effect concurrent disposition of the operations of Storage.

The proposal, which is the subject matter of the instant application, is contained in two agreements dated October 4, 1937, one between applicant and vendor, and the other, an escrow agreement, entered into jointly by applicant, vendor, Mrs. Mills, and Valley Savings Bank, Des Moines, the latter the escrow agent. Under the proposal applicant would acquire all of the operating rights and physical property of White Lines, not involved in No. MC-F-304, and vendor would acquire stock control of Storage. To effectuate the transfer and acquisition of control vendor is to exercise his option and deposit with the escrow agent all of the outstanding stock of the three companies, and applicant is to deposit with such agent the sum of \$80,000, the total purchase price of the stock. The deposits have been made with that agent, who is authorized, upon receipt of certified copies of orders from the governing Federal and State authorities approving the transfer of the rights and property of White Lines, to pay the \$80,000 to Mrs. Mills, and to deliver to vendor all the outstanding stock of

421 White Lines, and to applicant, the outstanding stock of Storage as security for an advance to vendor, hereinafter explained. Upon delivery of the stock of White Lines to vendor, the latter is to effect dissolution of these companies and, in connection with such dissolution, is to acquire their rights and physical assets in consideration of his assuming their liabilities, except an equipment obligation of \$9,400 which applicant is to assume, and thereafter convey to applicant the rights and property of White Lines. Of the total \$80,000 stock-purchase price, \$30,000 was considered as an advance by applicant to vendor to enable him to consummate his part of the transaction. Ven-

dor is to repay applicant the sum advanced in four promissory notes, bearing interest at 5 percent, payable semi-annually from the date the stock of Storage is released to applicant. Under the terms of the agreement, applicant has the right, in default of principal or interest, to vote such stock, but upon payment of the notes it is to release the stock to the record owner. This latter aspect of the transaction is the subject of later consideration herein.

Applicant will expend for its part of the transaction a total of \$59,400 for which it will receive certain State certificates and permits; whatever interstate operating rights White Lines may obtain pursuant to their respective "grandfather" applications; goodwill; the exclusive right to use the name "White Lines" when not in combination with the words "Transfer and Storage"; and physical property, consisting principally of motor vehicles, having a net book value as of October 31, 1937, of \$44,786.

If the instant application is approved, applicant would use only such common-carrier operating rights as White Lines may have over the route between Omaha and Chicago, 500 miles, and over two short branch routes to Muscatine and Cedar Rapids, and agrees to abandon claims to all other operating rights of White Lines, so far as the instant transaction is concerned, including any duplication in rights over the routes to be retained. Between East Moline, Ill., and Omaha, 300 miles, the highway closely parallels the railroad. Between the former point and Chicago the maximum point of divergence between the highway and railroad is approximately 25 miles. Service is not to be  
422 provided to any point not also a station on the railroad.

The balance sheet of the railroad, which has advanced the funds necessary to complete the respective transactions, shows assets of \$503,209,452, including current assets \$23,981,846. Liabilities include current liabilities \$248,519,913. Income statements for 1935, 1936, and the 8-months' period ended August 31, 1937, show deficits of \$15,023,571, \$3,380,280, and \$6,831,161, respectively.

The balance sheet of White Freight as of October 31, 1937, shows total assets of \$90,034, consisting of: Current assets \$29,323, including due from connecting carriers \$9,927, accounts receivable, less reserve for bad debts, \$8,103, c. o. d.'s receivable \$6,242, and material and supplies \$2,775; carrier operating property, less depreciation, \$54,705; advances to employees \$544; and prepayments \$5,462. Liabilities were: Current liabilities \$12,802 in-

cluding due Storage Company \$68,972, accounts payable—trade \$10,195, due connecting lines \$10,171, and accrued taxes and insurance \$7,526; reserve for claims \$515; due Midway Transit Co. \$500; capital stock \$40,000; and surplus (debit balance) \$63,783. Income statement for 1935 shows net income, after provision for Federal income tax, of \$3,727, and statements for the 6-months' period ended June 30, 1936, 12-months' period ended June 30, 1937, and 4-months' period ended October 31, 1937, show deficits of \$25,527, \$26,069, and \$3,304, respectively.

The balance sheet of White Trucking as of October 31, 1937, shows total assets of \$14,528, consisting of: Current assets \$11,554, principally accounts receivable; carrier-operating property, less depreciation, \$2,792; and deferred debits \$180. Liabilities were: Current liabilities \$307; capital stock \$20,000; and surplus (debit balance) \$5,781. Income statement for 1935 shows net income, after provision for Federal income tax, of \$801, and statements for the 6-months' period ended June 30, 1936, 12-months' period ended June 30, 1937, and 4-months' period ended October 31, 1937, show deficits of \$331 and \$5,485, and net income of \$73, respectively.

423 Applicant's balance sheet as of November 15, 1937, giving effect to the proposed transaction, shows total assets of \$103,950, consisting of: Cash working fund proposed to be advanced by the railroad \$10,000; notes receivable—L. E. Stone \$30,000; investments and advances—the railroad \$3,445; cost of acquiring White Lines \$59,400, and incorporation fees and other expenses \$1,105. Liabilities were: Non-negotiable debt to the railroad \$90,000; equipment purchase contracts payable \$9,400; capital stock \$10,000; and surplus (debit balance) \$5,450.

In an effort to retrieve some of the substantial volume of less-than-carload freight diverted from the railroad to competing highway carriers, and to improve the railroad's service to the public, applicant proposes to utilize the operating rights of White Lines between Omaha and Chicago in the conduct of three distinct types of service, (1) a coordinated rail-truck service, to be auxiliary to existing all-rail service by moving merchandise cars to certain concentration or set-out points, and then making distribution by truck; (2) an all-truck service on short hauls between stations, where feasible and economical, as a substitute for rail service; and (3) an all-truck service restricted to points on the railroad, but in addition to rather than a substitute for rail service.

Considerable testimony was offered showing in detail the manner in which it is proposed to effect correlation of truck and rail service over the routes described, and many resulting advantages were recited. The general plan is similar in character to that outlined in *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101, and 5 M. C. C. 9 and 49, hereinafter called the *Barker case*, and leads to the same conclusions reached in that case, namely:

The motor vehicle can undoubtedly be used as a very valuable auxiliary or adjunct to railroad service, particularly less-than-carload service, and the many opportunities for such use here have been pointed out, of record and are clear. Such coordination of rail and motor-vehicle operations should be encouraged. The result will be a new form of service which should prove of much public advantage. Nor do we believe that the creation of this new form of service will "unduly restrain competition". On the contrary, it should have the opposite effect.

424 We conditioned our authorization in the *Barker case* to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad, and in general indicated the scope of approved and disapproved operations. Many of the operating rights which would accrue to applicant under the instant transaction, if no conditions were imposed, are of a character which we disapproved in the case cited. Applicant concedes this fact and, as heretofore stated, is agreeable to abandonment of all rights except common-carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids, and the "grandfather" applications of White Lines will be considered as amended accordingly.

Protestants urge that we deny the application on the grounds: (1) that applicant has not described with sufficient particularity the precise plan or manner in which it proposes to coordinate rail-truck service or resulting economies; (2) that the financial conditions of the railroad and White Lines do not justify the purchase in the public interest; (3) that the resulting competitive situation would be contrary to the intent of the act; and (4) that rail-truck service may be accomplished through use of independent motor lines. The proposed plan of operations was sufficiently described, both generally and by typical examples, to justify our approving the transaction, sub

ject to the conditions and restrictions hereinafter imposed. While it is true that the railroad is in financial straits, the evidence warrants the conclusion that the proposed transaction will not harm it but rather work to its financial advantage. The third argument is also untenable because, as numerous motor-carrier competitors operate throughout the territory, there will be no restraint of competition. It may be, as contended, rail-and-highway coordination may be accomplished through use of independent truck lines. However, there is nothing in the law to prevent a railroad, if it otherwise meets the proof requirements of the law, from acquiring control of a motor carrier to be used for this purpose, and we are satisfied that the proof requirements have been met in the instant proceeding.

425 In one exceptions brief it is stated:

Exception is taken to the proviso that applicant shall not render service from or to, or interchange traffic at any point other than a station on the lines of the Chicago, Rock Island and Pacific Railway Company. This exceptor believes that such restrictions will be against public interests as represented by Cedar Rapids shippers because it is impossible to foresee the changes that may take place in the transportation field in Iowa.

✓ Respecting the foregoing, what we stated in the *Barker* case is equally applicable herein, namely:

Nor do our conclusions overlook the interests of the shipping public along the routes here considered. If as a result of proceedings initiated by shippers it is shown, after full hearing, that existing transportation facilities are inadequate or otherwise unsatisfactory at a point in connection with which service is prohibited under the terms of the order herein, such evidence may be a basis for our removing the restriction in the pertinent certificate and ordering present applicants to render service to that point. (5 M. C. C. 9, 14.)

Another intervener excepted to the examiner's recommended findings because:

The report contains no provision to the effect that if the Chicago, Rock Island and Pacific Railway extends to its owned and controlled motor carrier, the applicant herein, the privilege of through routes and joint rates, then both the railroad and its motor carrier should be required to extend a similar privilege to such other motor carriers as may request same.

The act contains specific provisions governing our powers with reference to the regulation of motor carrier rates, in

cluding joint rates with other types of carriers. We are of the opinion, therefore, that there is no occasion to attach conditions affecting rates to a grant of authority herein under section 213.

Our approval in the *Barker case* was upon the condition, among others, that the Pennsylvania Railroad Company take such steps as would be legally possible to acquire, subject to our approval, from an intermediate holding company, the American Contract and Trust Company, all interest which the latter owned in the applicant motor carrier, Pennsylvania Truck Lines, Incorporated. Our approval herein will similarly be conditioned upon  
 426 elimination of the intermediate holding company.

As vendor is neither a motor carrier, nor a person controlling such carrier, his proposed acquisition of the stock of Storage does not require our approval under section 213. However, as heretofore pointed out, this stock is to be pledged with applicant to secure its advance of \$30,000 to vendor in order that he might acquire the control of that carrier and thus consummate his part of the transaction. If vendor defaults in the repayment of this sum applicant would, so far as the agreement is concerned, apparently come into control of another motor carrier. Its routes, because of their location in relation to the railroad, could not, so far as evidence herein is concerned, be used to public advantage in the latter's operation. Obviously the agreement, so far as it might result in acquisition of control of Storage by the railroad, cannot lawfully be consummated without our authority, and nothing herein is to be construed as granting such authority either directly or by implication.

We find that purchase by The Rock Island Motor Transit Company of the previously described operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, including the right to operate pending determination of the respective "grandfather" applications of these companies and the right, so far as operating rights the transfer of which is herein authorized is concerned, for any certificates which may be issued as a result of said applications, upon the terms and conditions set forth in the title application, except as hereinafter modified, which terms and conditions are found to be just and reasonable, will promote the public interest by enabling The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E.

Gorman, and Joseph B. Fleming, trustees) to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled: *Provided, however*, (1) that the said railroad shall promptly take such steps as are legally possible and necessary to acquire, subject to our approval, from Rock Island Improvement Company all interest which the latter owns in The Rock Island Motor Transit Company; (2) that applicant shall not, if the authority herein granted is exercised, render service from or to, or interchange traffic at, any point other than a station on the lines of said railroad; (3) that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition; and (4) that applicant shall not, without our authority, vote any of the stock of White Line Transfer & Storage Company, or exercise any control over its affairs in any manner whatsoever.

An appropriate order will be entered.

COMMISSIONER ROGERS dissents.

428

### Order

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 5, held at its office in Washington, D. C., on  
the 1st day of April, A. D. 1938

No. MC-F-445

ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE  
LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

Hearing and investigation of the matters and things involved in this proceeding having been had, and said division, on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

*It is ordered*, That purchase by The Rock Island Motor Transit Company of the described operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, upon the terms and conditions set forth in the findings in said report, be, and it is hereby, approved and authorized.

*It is further ordered*, That if the parties to the transaction herein authorized desire to consummate same, they

shall notify this Commission of their intention so to do, in writing, prior to the consummation thereof, and promptly take such further steps as will insure compliance with sections 215, 217, and 221 of the act, and with rules, regulations and requirements promulgated thereunder.

*It is further ordered*, That recital in the said report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

*It is further ordered*, That before recording the purchase upon its books, applicants shall submit, in triplicate, the related journal entries to our Bureau of Motor Carriers for approval.

*And it is further ordered*, That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the act, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL,  
*Secretary.*

431

Apr-5'38 395847

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY

Frank O. Lowden, James E. Gorman, Joseph B. Fleming  
Trustees

HARRY E. BOE,  
ATTORNEY

La Salle Street Station  
Chicago, Ill.

April 2, 1938.

Application of Rock Island Motor  
Transit Company to acquire White  
Line, etc. MC-F-445.

Hon. W. Y. Blanning,  
Director, Bureau of Motor Carriers,  
Interstate Commerce Commission,  
Washington, D. C.

Dear Sir:

In conformity with the requirement of the Commission's order of April 1st in the above-entitled proceeding, appli-

cant, The Rock Island Motor Transit Company, hereby notifies the Interstate Commerce Commission of its desire to consummate this transaction, it being the intention of the parties to effect transfer as of April 5, 1938, of the physical properties and operating rights of White Line Motor Freight Company, Inc., and White Line Trucking Company as involved in this proceeding.

Respectfully,

THE ROCK ISLAND MOTOR

TRANSIT COMPANY,

By HARRY E. BOE

*Its Attorney.*

ROUTE OF THE "ROCKETS"

THE "GOLDEN STATE LIMITED" TO CALIFORNIA

"ROCKY MOUNTAIN LIMITED" TO COLORADO

AIR CONDITIONED THROUGHOUT

432

AHM:rhs

April 11, 1938

Please refer to file

Finance: No. MC-F-445

Mr. Harry E. Boe, Attorney,  
The Rock Island Motor Transit Company,  
La Salle Street Station,  
Chicago, Illinois,

Dear Mr. Boe:

This will acknowledge receipt of your letter of April 2nd indicating purpose to consummate the transaction authorized by the Commission's order in the above-numbered finance docket, Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Incorporated, *et al* on April 5, 1938.

It is assumed that the preparation and submission of the related journal entries are having appropriate attention.

Very truly yours,

W. Y. BLANNING, *Director.*

D  
OC

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August 22, 1938  
Refer to N—MC-F-445

Mr. Harry E. Boe, Auditor  
The Rock Island Motor Transit Company,  
Chicago, Ill.

Dear Mr. Boe:

Referring to your letter of August 17, submitting an adjusting entry to correct the accounting for the acquisition of physical property and operating rights of White Line Motor Freight Company, Incorporated, *et al.*, on the books of Rock Island Motor Transit Company:

In view of your explanation with respect to the cost of tires and tubes acquired with the revenue equipment purchased, the accounting for this transaction as reflected by these two journal entries is approved.

Very truly yours,

W. Y. BLANNING, *Director.*

PFC:ROD

Copy to:

Mr. J. Edward Davey,  
Chief, Section of Finance

DC

OC

435

*Order*

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 5, held at its office in Washington, D. C., on the  
21st day of July, A. D., 1936.

The matter of regulations governing the adoption of tariffs, schedules, and supplements filed pursuant to Sections 217 and 218 of the Motor Carrier Act, 1935, being under consideration.

AND IT APPEARING, That good cause has been shown for the publication of such rules and regulations:

IT IS ORDERED, That when the name of a carrier is changed, or when its operating control is transferred to another carrier, or to a receiver, trustee, executor, administrator, or assignee, either in whole or in part, the carrier, receiver, trustee, executor, administrator, or assignee who (or which) will thereafter operate the properties shall, except as provided by Rule 4 (d) of the Special Circular hereinafter referred to, publish, file and post adoption notices and sup-

plements in the form and manner prescribed in Special Circular M No. 1, which is hereby approved and made effective, August 10, 1936.

By the Commission, Division 5:

GEORGE B. MCGINTY,  
*Secretary.*

(SEAL)

436

SPECIAL CIRCULAR M No. 1

RULE 1

CHANGE OF NAME, OR TRANSFER OF ENTIRE OPERATION

(a) (1) When the name of a *common* carrier is changed, or when its operating control is transferred to another *common* carrier, the carrier which will thereafter operate the properties shall file with the Interstate Commerce Commission and post at the stations and offices affected, an adoption notice numbered in its MF-ICC, MP-ICC, or ME-ICC series, reading as follows:

"The ..... (name and doing business as, if any, adopting carrier) hereby adopts, ratifies, and makes its own, in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by the ..... (name and doing business as, if any, of old carrier) prior to ..... (date)."

(a) (2) In addition to the above adoption notice the new carrier shall immediately file with the Interstate Commerce Commission and post at the stations and offices affected, a consecutively numbered supplement to each of the effective tariffs issued or adopted by its predecessor, reading as follows:

"Effective ..... (here insert date shown in the adoption notice) this tariff, or as amended, became the tariff of the ..... (name and doing business as, if any, of the new carrier) as per its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. ...."

(a) (3) Tariffs issued by other carriers or agents for and in behalf of the carrier absorbed, taken over, operated by another carrier, or whose name is changed, shall be amended on statutory notice, by the next regular supple-

ment filed, to eliminate the name of the old carrier and to add the name of the new carrier. Such supplement shall also contain the following provision:

"The ..... (name and doing business as, if any, of the adopting carrier) by its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. ...., having taken over the tariffs, etc., of the ..... (name and doing business as, if any, of the old carrier) the ..... (name and doing business as, if any, of the adopting carrier) is hereby substituted for the ..... (name and doing business as, if any, of the old carrier) wherever it appears in this tariff."

(b) (1) When the name of a *contract* carrier is changed or when its operating control is transferred to another *contract* carrier, the carrier which will thereafter operate the properties shall file with the Interstate Commerce Commission and post at the stations and offices affected an adoption notice numbered in its MF-ICC, MP-ICC, or ME-ICC series, reading as follows:

"The ..... (name and doing business as, if any, of the adopting carrier) hereby adopts, ratifies and makes its own, in every respect as if the same had been originally filed and posted by it, all schedules, contracts, concurrences or other instruments whatsoever including supplements or amendments thereto, filed 436A with the Interstate Commerce Commission by, or heretofore adopted by, the ..... (name and doing business as, if any, of the old carrier) prior to ..... (date)."

(b) (2) In addition to the above adoption notice, the new carrier shall immediately file with the Interstate Commerce Commission and post at the stations and offices affected a consecutively numbered supplement to each of the effective schedules issued or adopted by its predecessor reading as follows:

"Effective ..... (here insert date shown in the adoption notice) this schedule, or as amended, became the schedule of ..... (name and doing business as, if any, of the new carrier) as per its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. ...."

(b) (3) Schedules issued by agents for and in behalf of the carrier absorbed, taken over, operated by another carrier, or whose name is changed, shall be amended on statutory notice by the next regular supplement filed to eliminate the name of the old carrier and to add the name of the new carrier. Such supplement shall also contain the following provision:

"The ..... (name and doing business as, if any, of the adopting carrier) by its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. ...., having taken over the schedules, etc., of the ..... (name and doing business as, if any, of the old carrier) the ..... (name and doing business as, if any, of the adopting carrier) is hereby substituted for the ..... (name and doing business as, if any, of the old carrier) wherever it appears in this tariff."

(c) Succeeding supplements or amendments to such tariffs or schedules filed by the adopting carrier shall be numbered consecutively following the number of the adoption supplement or amendment.

New tariffs or schedules reissuing or succeeding such tariffs or schedules shall be numbered in the MF-ICC, MP-ICC or ME-ICC series of the adopting carrier. The adopting carrier when cancelling any tariff or schedule issued or adopted by the old carrier, must identify it in the cancellation notice by reference to its MF-ICC, MP-ICC or ME-ICC Number, by reference to the name of its issuing carrier, and, when tariffs or schedules have been published by the old carrier in more than one series, by reference to the particular series in which that tariff or schedule was published.

## RULE 2

### TRANSFER OF A PART OF AN OPERATION

(a) When the operating control of a common carrier's properties is transferred in part to another common carrier, the carrier which will thereafter operate that part of the properties shall file with the Interstate Commerce Commission and post at the stations and offices affected an adoption notice numbered in its MF-ICC, MP-ICC, or ME-ICC series reading as follows:

"The ..... (name and doing business as, if any, of adopting carrier) hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney, or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by, the ..... (name and doing business as, if any, of the old carrier) prior to ..... (date) in so far as said instruments apply (here describe the operations transferred)."

(b) (1) In addition to the above adoption notice, the old carrier shall immediately file with the Interstate Commerce Commission and post at the stations and offices affected *under proper concurrence from the new carrier*, a supplement to each of its effective tariffs covered by the adoption notice reading as follows:

"Effective . . . . . (here insert date shown in the adoption notice) this tariff or as amended, in so far as it contains rates, rules, and regulations applying (here describe the operations transferred), became the tariff of the . . . . . (name and doing business as, if any, of the new carrier) as per its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. . . . . of . . . . . (name and doing business as, if any, of the new carrier)."

(b) (2) Tariffs issued by other carriers or agents applicable in connection with that part of the line taken over or operated in part by another carrier, shall be amended on statutory notice by the next regular supplement filed to incorporate necessary changes. Such supplement shall also contain the following provision:

"The . . . . . (name and doing business as, if any, of the new carrier) by its adoption notice MF-ICC (or MP-ICC or ME-ICC) No. . . . ., having taken over tariffs, etc., of the . . . . . (name and doing business as, if any, of the old carrier) in so far as they contain rates, charges, rules and regulations applying . . . . . (here describe the operations transferred), the . . . . . (name and doing business as, if any, of the new carrier) is hereby substituted for the . . . . . (name and doing business as, if any, of the old carrier) wherever the latter appears in this tariff in connection with said points, routes, or territory."

(c) Rates, rules and regulations applying locally between points on the transferred portion shall be transferred as quickly as possible to tariffs of the new carrier. The old carrier shall cancel such rates, rules and regulations from its tariffs on statutory notice and shall refer by MF-ICC, MP-ICC or ME-ICC number to the tariffs of the new carrier for rates to apply thereafter. The new carrier shall publish and file corresponding rates, rules and regulations on statutory notice to become effective upon the date upon which the cancellation of the old carrier's rates, rules and regulations becomes effective.

(d) If on the transferred portion there is a point which will continue to be served by the old line as well as being

established as a point on the new line; a note or reference mark may be shown in connection with the name of that point and explained substantially as follows:

"This adoption notice does not have the effect of eliminating ..... as a point served by ..... (name and doing business as, if any, of the old carrier) but has the effect of establishing service at said point by ..... (name and doing business as, if any, of the new carrier)."

438 (e) When the operating control of a *contract* carrier's properties is transferred in part to another *contract* carrier, the old carrier shall issue a supplement to each of its effective schedules upon statutory notice reading as follows:

"Effective ..... (date) the minimum rates, charges, rules, and regulations in this schedule are withdrawn and cancelled in so far as they apply ..... (here describe the operations transferred). For minimum rates, charges, rules, and regulations to apply in the future, see schedule MF-ICC (or MP-ICC or ME-ICC) No. ...., issued by ..... (name and doing business as, if any; of new carrier)."

The new carrier shall issue and file at the same time, to become effective on the same date, a schedule or schedules establishing on statutory notice minimum rates, charges, rules and regulations in lieu of those withdrawn by the old carrier.

### RULE 3

#### ASSUMPTION OF OPERATING CONTROL BY RECEIVERS, TRUSTEES, EXECUTORS, ADMINISTRATORS OR ASSIGNEES

Adoption notices similar to those prescribed in Rules 1 and 2, but numbered consecutively in the MF-ICC, MP-ICC, or ME-ICC series of the old carrier, must immediately be filed by a receiver, trustee, executor, administrator, or assignee when he assumes possession and operating control of a carrier's lines, either in whole or in part, and must show the names of the receivers, trustees, executors, administrators, or assignees on the title page in connection with the carrier's name. When such possession and operating control are terminated, the carrier taking over the properties shall file an adoption notice, and if a change in the name of the carrier has been made, shall also file supplements as prescribed in Rules 1 and 2.

# **RULE 4**

## **GENERAL INSTRUCTIONS APPLICABLE TO ALL CHANGES MADE UNDER THE AUTHORITY OF THIS CIRCULAR**

(a) Notices of adoption shall be filed with the Commission immediately and if possible on or before the date shown therein. Copies shall be sent to each agent or carrier to which power of attorney or concurrence has been given by the old carrier. The effective date must be the date (as shown in the body of the notice) on which the change in name or operation occurs, except that, if prior approval by the Interstate Commerce Commission of such change is required, the effective date shown shall not antedate that approval.

(b) Concurrences and powers of attorney adopted by a carrier, receiver, trustee, executor, administrator, or assignee shall, within 120 days, be replaced and superseded by new concurrences and powers of attorney issued 439 by, and numbered in the series of the new carrier, receiver, trustee, executor, administrator or assignee, except that receivers, trustees, executors, administrators, or assignees may number concurrences and powers of attorney in the old series. The cancellation reference to the former concurrence or power of attorney must include the name or initials of the former issuing carrier. Concurrences and powers of attorney which will not be replaced by new issues shall be regularly revoked on the notice and in the manner prescribed by Rule 10 (d) of Tariff Circular MF No. 1 or Rule 15 (d) of Tariff Circular MP No. 2.

(c) Adoption notices and special supplements issued under the authority of this circular shall contain no other matter.

(d) The provisions of this circular do not apply to changes in name or operating control of—

- (1) a rail carrier;
- (2) a motor carrier operating under the provisions of Section 5 (21) of Part I;
- (3) a motor carrier, to the extent that it participates in the publication and maintenance of joint rates with carriers named in (1) and (2) above;

nor to changes in name or operating control not authorized by Part II.

*Order*

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 29th day of September, A. D., 1938.

The matter of regulations governing the adoption of tariffs, schedules, and supplements filed pursuant to Sections 217 and 218 of the Motor Carrier Act, 1935, when authority for the temporary operation of motor carrier properties has been granted pursuant to the provisions of Section 210a (b) of said Act, being under consideration.

*It appearing*, That good cause has been shown for the publication of such rules and regulations:

*It is ordered*, That when authority for the temporary operation of motor carrier properties has been granted pursuant to the provisions of Section 210a (b) of the said Act, motor carriers shall publish, file and post adoption notices and supplements in accordance with the regulations heretofore adopted and promulgated in Special Circular M No. 1, as modified and supplemented by Amendment No. 1 to said Special Circular M No. 1;

*And it is further ordered*, That the said Amendment No. 1 to Special Circular M No. 1 be, and it is hereby approved and made effective September 29, 1938.

By the Commission, Division 5:

W. P. BARTEL,  
*Secretary.*

(SEAL)

441 . . . . . AMENDMENT No. 1  
to  
SPECIAL CIRCULAR M No. 1

Special Circular M No. 1 is hereby amended to include the following addition.

9 RULE 5 (ADDITION)

TEMPORARY OPERATION OF MOTOR CARRIER PROPERTIES UNDER AUTHORITY OF SECTION 210a (b).

(a) When temporary authority to take over the operating control of all or a portion of the operations of a carrier is granted pursuant to the provisions of Section 210a (b) of the Motor Carrier Act, 1935, as amended, the new carrier that assumes temporary control of the operations of the old carrier shall, except as provided in paragraph (b) of this rule, comply with the provisions of Rules 1, 2 and 4 of this circular.

(b) The new carrier is not required to reissue the adopted concurrences and powers of attorney during the period of temporary control of the operations of the old carrier. New concurrences and powers of attorney granting authority to publish rates or fares from or to points included in the temporarily controlled operations, shall be in the series of the old carrier; for example,

MF-XA 2 No. 6 (Roe's Trucking Series)

John Doe Transport, Inc.

Operator of

Richard Roe

d/b/a

Roe's Trucking

(Post-office address)

(c) The new carrier, when it publishes in a tariff or schedule issued in its name, rates, fares, charges, or other provisions relating thereto, from, to, or between points included in the temporarily controlled operations, shall file such publication in the name of the new carrier as operator of the old carrier under consecutive I. C. C. numbers (MF, MP or ME) and in the series of the old carrier. For example, if John Doe Transport, Inc. assumes temporary control of the operations of Richard Roe dba Roe's Trucking, the title page of tariffs, schedules, or supplements thereto, must show the I. C. C. number and name of the carrier in substantially the following manner:

MF-I. C. C. No. 17 (Roe's Trucking Series)

John Doe Transport, Inc.

Operator of

Richard Roe

d/b/a

Roe's Trucking

(d) When permanent authority to take over the temporarily controlled operations is granted pursuant to the provisions of Section 213 of the Motor Carrier Act, 1935, the new carrier shall file an adoption notice and otherwise comply with the provisions of Rules 1, 2 and 4 of this circular.

(e) If the temporary authority to assume operating control of the old carrier is not made permanent, the old carrier must file an adoption notice and otherwise comply with Rules 1, 2 and 4 of this circular. The effective date to be shown in the adoption notice and adoption supplements is the date on which the temporary authority for the new carrier to operate the properties of the old carrier expires or is vacated.

442

*Order*

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 5, held at its office in Washington, D. C.,  
on the 30th day of April, A. D., 1940.

The matter of regulations governing the adoption of tariffs supplements and other documents filed pursuant to Section 217 of the Motor Carrier Act, 1935, and as amended, being under consideration and good cause appearing therefore:

*It is Ordered*, That the regulations contained in Special Circular M No. 1, and as amended, be, and they are hereby, canceled, effective April 1, 1941, insofar as said regulations apply to the adoption of publications filed by common carriers by motor vehicle and common carriers by water, other than railroad owned or controlled water carriers, pursuant to Section 217 of the Motor Carrier Act, 1935, and as amended, and shall be superseded by the regulations contained in Tariff Circular MF No. 3.

*It is further Ordered*, That Amendment No. 2 to Special Circular M No. 1 providing for the cancellation of said regulations, be, and it is hereby approved and made effective April 1, 1941.

By the Commission, Division 5.

W. P. BARTEL,  
*Secretary.*

(SEAL)

443

## AMENDMENT No. 2

## SPECIAL CIRCULAR M No. 1

*Cancellation Notice*

Effective April 1, 1941 the regulations contained in Special Circular M No. 1, and as amended, Rules 1, 2, 3, 4 and 5 thereof, insofar as said regulations govern the publication, filing and posting of adoption notices and supplements by common carriers by motor vehicle and common carriers by water, other than railroad owned or controlled water carriers, are canceled.

On and after April 1, 1941, regulations contained in Tariff Circular MF No. 2 will govern.

445

September 21, 1939

Please refer to file  
X-302-102684

Mr. M. B. Sherer, Business Manager  
Mid-Western Motor Freight Tariff Bureau  
Searritt Building  
116 East Ninth Street  
Kansas City, Missouri

Dear Mr. Sherer:

This has reference to your letter of September 8, 1939, File KF-70-8, regarding the adoption of tariffs, etc., of White Line Motor Freight Company, Inc. by William E. Bell, doing business as Midway Transit Company, and The Rock Island Motor Transit Company.

William E. Bell, doing business as Midway Transit Company, by its adoption notice MF-I. C. C. No. 2, adopted all tariffs, etc., of White Line Motor Freight Company, Inc., insofar as said instruments apply within the territory east of Chicago, Illinois. The Rock Island Motor Transit Company, by its adoption notice MF-I. C. C. No. 3, adopted all tariffs, etc., of White Line Motor Freight Company, Inc., insofar as said instruments apply within the territory west of Chicago, Illinois. In other words, all of the operating rights of White Line Motor Freight Company, Inc. have been transferred to William E. Bell, doing business as Midway Transit Company, and The Rock Island Motor Transit Company.

You should amend tariffs that may be involved in accordance with the requirements of the Commission's Special Circular M No. 1. This will have the effect of eliminating White Line Motor Freight Company, Inc. as a participant in tariffs that may be involved and adding in lieu thereof the name of William E. Bell, doing business as Midway Transit Company, and The Rock Island Motor Transit Company, as participating carriers. If either of the new carriers does not wish to participate in such tariffs, you may then eliminate such carrier as a participant.

446 If I have not made myself clear in this matter, please feel free to communicate further with this office.

Very truly yours,

W. Y. BLANNING,  
Director.

CC: Mr. Walter Hitchen, General Agent  
The Rock Island Motor Transit Company  
2 Ninth Street  
Des Moines, Iowa

-CC: Mr. William E. Bell  
Midway Transit Company  
755 West Main Street  
Benton Harbor, Michigan

CC: Mr. James F. Miller  
District Director  
Bureau of Motor Carriers  
Interstate Commerce Commission  
912 Baltimore Avenue  
Kansas City, Missouri

GEH/jem

448

F2374

166907

February 23, 1945

Please refer to file  
•X-315

The Rock Island Motor Transit Company  
139 West Van Buren Street  
Chicago, Illinois

Gentlemen:

The Commission by its order dated January 4, 1945, in Docket No. MC-F-2374, authorized the purchase by your company of a portion of the operating rights of Roland H. Kinney, doing business as Mohawk Freight Lines, covered by and included in Certificate No. MC-35820.

If and when the above-mentioned transaction is consummated, you are required to issue, file with this Commission and post for public inspection an adoption notice, which will adopt for your account the effective tariffs, etc., filed with this Commission by or in behalf of the selling carrier insofar as such instruments apply in connection with the operating rights transferred. To assist you in the preparation of your adoption notice, enclosed find a specimen together with instructions as to its preparation.

The selling carrier is a party to tariffs issued by other carriers and tariff publishing agents as follows:

Eastern-Central Motor Carriers Association, Agent  
 Everett H. Russell, Chief of Tariff Bureau  
 755 North Main Street

Akron 10, Ohio;

Middlewest Motor Freight Bureau, Agent  
 J. W. McFadden, Chief of Tariff Bureau  
 116 East 9th Street

Kansas City 6, Missouri;

Mid-Western Motor Freight Tariff Bureau, Inc., Agent  
 J. W. McFadden, Chief of Tariff Bureau  
 116 East 9th Street

Kansas City 6, Missouri.

When you filed call up in 30 days to Sec. 3 for  
 adjustment of Selling Carriers Tariff.  
 LET

A copy of your adoption notice should be furnished each agent and each carrier now having effective tariffs on file with this Commission applicable in connection with the operating rights transferred in order that the necessary tariff changes may be promptly made.

Under ordinary circumstances, your adoption notice should not be canceled since it is required to remain as an effective issue in the files of the Commission.

The Commission's order, mentioned in the first paragraph of this letter, requires that you shall confirm in writing to the Commission immediately upon consummation the date on which consummation has actually taken place, promptly comply with certain requirements of the Interstate Commerce Act and of this Commission and that, unless the authority granted therein is exercised within 180 days from the date thereof, the order shall be of no further force and effect. Therefore, I shall expect to receive for filing three copies of your adoption notice upon consummation of the transaction.

If you desire additional information, please feel free to communicate with this office.

Very truly yours,

WALTER T. HAYES,  
 Assistant Director

Enclosure

cc: Mohawk Freight Lines  
 Roland H. Kinney, d/b/a  
 239-941 West Eighth Street  
 Kansas City, Missouri

Immediately upon consummation of the purchase, mentioned in the first paragraph of the foregoing letter, you should amend your tariff, MF-I, C. C. No. 4, so it will apply on the operations you have retained.

cc: District Director Purse  
Chicago 7, Illinois  
Specimen adoption notice attached.

LFT  
d

Adjusted by  
Sup. No. 27  
GTH  
6-1-45

450

MF-I, C. C. No. 19  
166907

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

# THE ROCK ISLAND MOTOR TRANSIT COMPANY

## *Adoption Notice*

The Rock Island Motor Transit Company hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, traffic agreements, statements of divisions, powers of attorney, concurrences, or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted, by, Roland H. Kinney, doing business as Mohawk Freight Lines

April 2, 1945

(Show date consummated but not

Prior to ~~price~~ to January 4, 1945) insofar as said instruments apply on the commodities moving regular routes, from to or between points and places as specified on Page 2 hereof.

This adoption notice does not have the effect of eliminating Hutchinson, McPherson, Topeka and Wichita, Kansas, as points served by Roland H. Kinney, doing business as Mohawk Freight Lines, but has the effect of establishing service at said points by The Rock Island Motor Transit Company.

(Show in this space date

Issued adoption notice is prepared)

SPECIMEN

April 2, 1945

(Show date consummated  
but not prior to

EFFECTIVE January 4, 1945)

Issued under authority of Rule 19 of Tariff Circular MF-  
No. 3 and in conformity with Interstate Commerce Com-  
mission Docket No. MC-F- 2374.

ISSUED BY

(Show name and title of issuing officer)

(Show address)

451 Description of commodities, routes and territory  
transferred.

General commodities, except those of unusual value  
and except dangerous explosives, household goods as  
described in *Practices of Motor Common Carriers of  
Household Goods*, 17 M. C. C. 467, commodities in bulk,  
commodities requiring special equipment and those  
injurious or contaminating to other lading.

Between Topeka, Kansas, and McPherson, Kansas;

From Topeka over U. S. Highway 40 to Salina,  
thence over U. S. Highway 81 to McPherson, and  
return over the same route.

Between Hutchinson, Kansas and Wichita, Kansas;

From Hutchinson over Kansas Highway 96 to  
Wichita and return over the same route.

Service is authorized to and from all intermediate  
points.

452

166907

March 30, 1945

Please refer to file

X-315-166895

X-315-166907

The Rock Island Motor Transit Company  
Walter Hitchen, General Freight Agent  
402 Plymouth Building  
Des Moines 9, Iowa

Dear Mr. Hitchen:

On March 5, 1945, the Commission received your adop-  
tion notices MF-I. C. C. Nos. 19 and 20 providing for the

adoption of tariffs, etc., of Roland H. Kinney, doing business as Mohawk Freight Lines (in part) and W. A. Remmers and M. K. Remmers, doing business as Remmers Truck Line, respectively. My two letters of February 23, 1945, file X-315, addressed to your company at Chicago, Illinois, requested that these adoption notices be filed in connection with the purchase of a portion of the operating rights of the first named carrier covered by and included in Certificate No. MC-35820 and the operating rights of the last named carrier covered by Certificate No. MC-26916 Sub 1 authorized by the Commission's orders in Dockets Nos. MC-F-2374 and MC-F-2394, dated January 4, 1945. The purchase of these operating rights was approved subject to certain conditions and limitations including the following:

"The service to be performed by Transit shall be limited to that which is auxiliary to, or supplemental of, service of The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)."

I regret to inform you that I was in error in requesting your company to file these adoption notices. I overlooked the fact that under the principle laid down by the Commission in *Texas & Pacific M. Transport Co. Com. Cer. Application*, 41 M. C. C. 721, a motor carrier whose operating authority is restricted to service which is auxiliary to or supplemental of rail service, without other qualifications, may not perform service under all-motor local and all-motor joint rates with connecting motor carriers, and accordingly may not maintain or be in party to tariffs containing all motor rates. For such reason your MF-I. C. C. Nos. 19 and 20 are rejected and two copies of each are returned to you herewith. The third copy of each will be returned to you at a later date by your district office at Chicago.

153 In order to meet the requirements of Section 217 of the Interstate Commerce Act in connection with these operations you may have Agent Kipp show in his National Substituted Freight Service Directory MF-I. C. C. No. A-174 (I. C. C. No. A-3576) that you perform substituted service for The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees) in connection with the involved points.

Very truly yours,

WALTER T. HAYES  
Assistant Director

## Enclosures

cc: The Rock Island Motor Transit Company  
139 West Van Buren Street  
Chicago, Illinois

Eastern-Central Motor Carriers Association, Agent  
Everett H. Russell, Chief of Tariff Bureau  
755 North Main Street  
Akron 10, Ohio

In view of the rejection of adoption notice MF-I. C. C. No. 19 of The Rock Island Motor Transit Company you should not, under any circumstances, attempt to reflect in your participating carrier tariff the adoption of Roland H. Kinney, doing business as Mohawk Freight Lines. Instead, you should cancel all rates and other provisions published in your tariffs for the account of this carrier applicable in connection with the operations transferred. These operations are set forth on the attached sheet. The other carriers W. A. Remmers and M. K. Remmers, doing business as Remmers Truck Line, is not listed in your participating carrier tariff.

Midwest Motor Freight Bureau, Agent  
J. W. McFadden, Chief of Tariff Bureau  
116 East 9th Street  
Kansas City 6, Missouri

In view of the rejection of adoption notices MF-I. C. C. Nos. 19 and 20 of The Rock Island Motor Transit Company you should not, under any circumstances, attempt to reflect in your tariffs the adoptions covered thereby. Instead you should eliminate the participation of W. A. Remmers and M. K. Remmers, doing business as Remmers Truck Line from all of your tariffs in which this carrier participates, and cancel from your tariffs all rates and other provisions published for the account of Roland H. Kinney, doing business as Mohawk Freight Lines applicable in connection with the operations transferred. The operations of Roland H. Kinney, doing business as Mohawk Freight Lines which were purchased by The Rock Island Motor Transit Company are set forth on the attached sheet.

cc: Mid-Western Motor Freight Tariff Bureau, Inc., Agent  
 J. W. McFadden, Chief of Tariff Bureau  
 116 East 9th Street  
 Kansas City 6, Missouri

In view of the rejection of adoption notices MF-  
 I. C. C. Nos. 19 and 20 of The Rock Island Motor  
 Transit Company you should not, under any cir-  
 cumstances, attempt to reflect in your tariffs the  
 adoptions covered thereby. Instead you should  
 eliminate the participation of W. A. Remmers and  
 M. K. Remmers, doing business as Remmers  
 Truck Line from all of your tariffs in which this  
 carrier participates, and cancel from your tariffs  
 all rates and other provisions published for the  
 account of Roland H. Kinney, doing business as  
 Mohawk Freight Lines applicable in connection  
 with the operations transferred. The operations  
 of Roland H. Kinney, doing business as Mohawk  
 Freight Lines which were purchased by The Rock  
 Island Motor Transit Company are set forth on  
 the attached sheet.

District Director Snodgrass

District Director Purse

Please attached the enclosed rejection slips to your  
 files and return your copies of the rejected publi-  
 cations direct to the carrier.

File NA 152435

455 General commodities, except those of unusual  
 value and except dangerous explosives, household  
 goods as defined in *Practices of Motor Common  
 Carriers of Household Goods*, 17 M. C. C. 467, com-  
 modities in bulk, commodities requiring special  
 equipment and those injurious or contaminating  
 to other lading.

Between Topeka, Kansas and McPherson, Kan-  
 sas:

From Topeka over U. S. Highway 40 to Salina,  
 thence over U. S. Highway 81 to McPherson,  
 and return over the same route.

Between Hutchinson, Kansas, and Wichita, Kan-  
 sas:

From Hutchinson over Kansas Highway 96  
 to Wichita and return over the same route.  
 Service is authorized to and from all inter-  
 mediate points.

456 THE CHICAGO ROCK ISLAND AND PACIFIC RAILROAD  
COMPANY

Joseph B. Fleming and Aaron Colnon, Trustees  
La Salle Street Station  
Law Department

Martin L. Cassell, Jr.  
General Attorney

Chicago 5, Ill.  
April 3, 1945

Mr. Walter T. Hayes  
Assistant Director  
Bureau of Traffic  
Interstate Commerce Commission  
Washington 25, D. C.

Re: X-315-166896

X-315-166907

The Rock Island Motor  
Transit Company Adoption of  
Tariffs of Remmers and Kinney

Dear Sir:

Your letter of March 30th addressed to Mr. Hitchen concerning the above captioned matter has been referred to the writer for attention.

Your communication has placed us in rather difficult circumstances, for, as the Commission has already been advised, operations were instituted on the morning of April 2nd. Your letter did not arrive until that morning when the trucks and operations in question were necessarily well under way. As the Motor Transit Company apparently has no tariffs on file due to your rejection, under which it may operate as a motor common carrier except as limited by the Kipp's tariff, we have requested our people by telephone to perform service only under that tariff. It should be understood, however, that this action is being taken without prejudice to the right of The Rock Island Motor Transit Company to conduct operations as a motor common carrier.

We respectfully submit that your action is in error in rejecting these tariffs for the reason given in your communication of March 30th, and ask that you withdraw your rejection and accept the adoption notices previously filed with you in accordance with your usual directions.

457 The order of the Commission in the Remmers and Kinney cases (MC-F-2394 and 2374) was no different in regard to this restriction which you quote from those received since the institution of The Rock Island Motor Transit Company's operations in 1938 by virtue of the White Line purchase in Docket MC-F-445. Since the White Line case just referred to, there have been a considerable number of purchase cases and in each of these you have requested adoption of the predecessor's tariffs as you did in the first instance in the present cases. In each of these previous proceedings the tariffs requested to be adopted by us were accepted by the Commission and operated under as a motor common carrier with revisions from time to time until, and including the present.

The rights which were acquired from Remmers and Kinney in the two instant finance cases were motor common carrier rights. The Commission in its order of January 4, 1945 in these two proceedings approved the transfer of these motor common carrier rights. It therefore follows that as a motor common carrier The Rock Island Motor Transit Company is entitled to and must file tariffs under Section 217.

As stated above, it has been your past practice to set up the tariffs in the first instance by the use of adoptions. If your practice is now being changed, and you desire The Rock Island Motor Transit Company to file original tariffs please advise. We should appreciate your early reply in this regard either directing as to the filing of original tariffs, or withdrawing your rejection, because of the fact of The Rock Island Motor Transit Company's having taken over these two concerns the shipping public in the territory concerned is being deprived of the motor common carrier operations in question.

Yours very truly,

MARTIN L. CASSELL, JR.

MLC:LM

458

April 11, 1945

Please refer to file  
X-315-166907  
cc-166896

The Chicago Rock Island and  
Pacific Railway Company  
Mr. Martil L. Cassell, Jr.,  
La Salle Street Station  
Chicago 5, Illinois

Dear Mr. Cassell:

This has reference to your letter of April 3, 1945, regarding the adoption by The Rock Island Motor Transit Company of tariffs of Roland H. Kinney doing business as Mohawk Freight Lines, and W. A. Remmers and M. K. Remmers, doing business as Remmers Truck Line, respectively, in connection with the purchase of operating authorities approved by the Commission in Dockets Nos. MC-F-2374 and MC-F-2394.

You state you are of the view that the rejection of adoption notices issued by The Rock Island Motor Transit Company, bearing its M. C. C. Nos. 19 and 20, was in error and that you are of the view the circumstances and conditions in connection with the above-mentioned purchases are no different from those present in connection with the purchase authorized in Docket No. MC-F-445, reported in 5 M. C. C. 451. At the time the purchase of the White Line Motor Company was approved in Docket No. MC-F-445, the Commission had not clearly defined what was meant by the condition contained in the approval of purchase to the effect that the transportation service to be performed should be "auxiliary to or supplemental of" rail service. In Docket No. MC-50544, *The Texas and Pacific Motor Transport Company Common Carrier Application*, 41 M. C. C. 721, decided January 21, 1943, Division 5 gave thorough consideration to this matter. In its report in that proceeding the Division said:

"Condition 1 limits the character of service to be performed by the petitioner to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. It permits the public to receive an improved rail service through the use of trucks instead of trains as a means of fulfilling the railway's undertaking to transport. *Petitioner's status as a common carrier by motor*

*vehicle is not dependent upon its having direct dealings with the shipping public. Willett Co. of Indiana, Inc., Extension—Ill., Ind. and Ky., 21 M. C. C. 405. Its service is necessarily limited to points served by the railway, hence condition 2. Condition 1 permits all-motor movements in the handling of rail traffic at rail-road rates and on railroad bills of lading. To and*

- 459 from certain points on segments of the rail lines, the improved service was to be accomplished by performing the movements partly by train and partly by motor vehicle, an auxiliary or supplemental service coordinated with the train service, hence condition 3. Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the rail service and, accordingly, may not properly be a party to tariffs containing all-motor or joint rates, " " " (Italics mine.)

A petition for reconsideration of this report by the entire Commission was denied February 14, 1944. For similar discussions of restrictions of this kind, see *Campbell Sixty-Six Express, Inc., Et Al. v. Frisco Transportation Company, Et Al.*, 43 M. C. C. 641.

In view of the condition imposed by the Commission in its findings in Dockets Nos. MC-F-2374 and MC-F-2394, and the findings in The Texas and Pacific Motor Transport Company case, The Rock Island Motor Transit Company may not participate in all-motor tariffs; consequently, it may not adopt tariffs published by or for account of Roland H. Kinney, doing business as Mohawk Freight Lines, and W. A. Remmers and M. K. Remmers, doing business as Remmers Truck Line, respectively.

You further state that, as a motor common carrier. The Rock Island Motor Transit Company is entitled to and must file tariffs under section 217 of the act. In this connection your attention is especially directed to the statement in the above quotation from the report in the Texas and Pacific Motor Transport Company case to the effect that a motor carrier whose operating authority is restricted to service which is auxiliary to or supplemental of rail service may operate only under rail billing and at rail rates. It appears, therefore, that if Agent Kipp's National Substituted Freight Service Directory, MF-I. C. C. No. A-174, I. C. C. No. A-3576, sets forth the service which The Rock Island

Motor Transit Company performs in substitution of the service of The Chicago, Rock Island and Pacific Railway Company, the filing requirements of the Interstate Commerce Act, insofar as the Rock Island Motor Transit Company is concerned, have been met.

Very truly yours,

WALTER T. HAYES  
*Assistant Director*

cc: District Director Purse.  
CHP:WM

462 No supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

M. F. I. C. C. No. 1  
Cancelled by MF-I. C. C. No. 3.  
Effective 4-5-1938.

## THE ROCK ISLAND MOTOR TRANSIT COMPANY

### *Adoption Notice*

The Rock Island Motor Transit Company hereby adopts, ratifies and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney, or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by The White Line Motor Freight Company, Inc., prior to April 5, 1938 insofar as said instruments apply to all points except Adel, Coralville, Redfield and Waukee, Iowa.

ISSUED APRIL 6, 1938

EFFECTIVE APRIL 5, 1938

Issued under authority of Special Circular M No. 1 and in conformity with order of the Interstate Commerce Commission No. M. C. F-445 dated April 1, 1938.

ISSUED BY:

E. R. DUNLEY,  
*General Freight Agent,*  
120 S. W. Fifth St.,  
Des Moines, Iowa.

## Correspondence

Sep 6 1938

X303-77693

File No.

## Received

Interstate Commerce Commission

117735 Apr 7 1938

Bureau of Motor Carriers

Section of Traffic

463-A No supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

MF-I. C. C. No. 3

Cancels

MF-I. C. C. No. 1

## THE ROCK ISLAND MOTOR TRANSIT COMPANY

*Adoption Notice*

THE ROCK ISLAND MOTOR TRANSIT COMPANY hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney, or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by or heretofore adopted by, the WHITE LINE MOTOR FREIGHT COMPANY, INC. prior to April 5, 1938 insofar as said instruments apply within the territory west of Chicago, Illinois, operated by WHITE LINE MOTOR FREIGHT COMPANY, INC.

ISSUED SEPTEMBER 15, 1938

EFFECTIVE APRIL 5, 1938

Issued under authority of Special Circular M No. 1 and in conformity with Interstate Commerce Commission Docket No. MC-W-445.

ISSUED BY

WALTER HITCHEN, *General Agent*

2 Ninth Street

Des Moines, Iowa

## Received

Interstate Commerce Commission

137799 Sep 17 1938

Bureau of Motor Carriers

Section of Traffic

464 No Supplement to this Schedule will be issued except for the purpose of canceling the Schedule, unless otherwise specifically authorized by the Commission.

MF-L. C. C. No. 4.

THE ROCK ISLAND MOTOR TRANSIT COMPANY

*Adoption Notice*

THE ROCK ISLAND MOTOR TRANSIT COMPANY hereby adopts, ratifies and makes its own, in every respect as if the same had been originally filed and posted by it, all schedules, contracts, concurrences or other instruments whatsoever including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by WHITE LINE TRUCKING COMPANY prior to April 5, 1938.

ISSUED SEPTEMBER 15, 1938

EFFECTIVE APRIL 5, 1938

Issued under Authority of Special Circular M No. 1 and in conformity with Interstate Commerce Commission Docket No. MC-F-445.

ISSUED BY

WALTER HITCHEN, *General Agent*

2 Ninth Street

Des Moines, Iowa

Received

Interstate Commerce Commission

137799 Sep 17 1938

Bureau of Motor Carriers

Section of Traffic

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Before the  
Interstate Commerce Commission  
Docket No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNEN, TRUSTEES)—  
CONTROL—PURCHASE—J. H. FREDERICKSON AND D. H.  
FREDERICKSON.

Omaha, Nebr., November 17, 1943.  
9:30 a. m.

Before: Frank A. Clifford, Examiner, Bureau of Motor  
Carriers, Interstate Commerce Commission.  
Met Pursuant to Notice.

APPEARANCES:

Martin L. Cassell, Jr., Attorney, 139 W. Van Buren  
Chicago, Ill., appearing on behalf of the applicants Joseph  
B. Fleming and Aaron Colnen, Trustees of the estate of  
the Chicago, Rock Island and Pacific Railway Company,  
and The Rock Island Motor Transit Company, 139 W.  
Van Buren, Chicago, Ill.

Lyle R. Higgins, Attorney, Harlan, Iowa, appearing for  
J. H. Frederickson & Son, Harlan, Iowa.

A. C. Miller, Greenfield, Ia., appearing for A. C. Miller  
Motor Freight Lines, Greenfield, Ia.

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PROCEEDINGS

*Statement by Examiner*

Exam. CLIFFORD: All right, gentlemen, please be in  
order. The Interstate Commerce Commission has assigned  
for hearing before me at this time and place Docket No.  
MC-F-2327, entitled The Chicago, Rock Island and Pacific  
Railway Company (Joseph B. Fleming and Aaron Colnen,  
Trustees)—Control; The Rock Island Motor Transit Com-  
pany—purchase—J. H. Frederickson and D. H. Frederik-  
son, being the application of the Chicago, Rock Island and  
Pacific Railway Company (Joseph B. Fleming and Aaron  
Colnen, Trustees), Chicago, Ill., for authority under Sec-  
tion 5, Interstate Commerce Act, as amended, to acquire  
control of the operating rights of J. H. Frederickson and  
D. H. Frederickson, doing business as J. H. Frederickson  
& Son, Harlan, Iowa, through purchase of said rights by  
the Rock Island Motor Transit Company, also of Chicago,  
Ill., for a total consideration of \$6,500.

Who appears for the applicants?

Mr. CASSELL: Martin L. Cassell, Jr., 139 W. Van Buren, Chicago Ill., appearing on behalf of the applicants Joseph B. Fleming and Aaron Colnon, Trustees of the estate of the Chicago, Rock Island and Pacific Railway Company and the Rock Island Motor Transit Company. I am an attorney and admitted to practice before the Interstate Commerce Commission.

Exam. CLIFFORD: Any other appearances?

Mr. HIGGINS: Lyle R. Higgins, attorney, Harlan, Iowa, duly authorized to practice before the Commission,  
471 appearing for the vendor, J. H. Frederickson & Son, Harlan, Ia.

Exam. CLIFFORD: Are you a registered practitioner?

Mr. HIGGINS: Yes.

Exam. CLIFFORD: Any other appearances?

Mr. MILLER: A. C. Miller, appearing for A. C. Miller Motor Freight Lines, Greenfield, Ia.

Exam. CLIFFORD: You are appearing for whom?

Mr. MILLER: A. C. Miller Motor Freight Lines.

Exam. CLIFFORD: Are you appearing for your own company, Mr. Miller?

Mr. MILLER: Yes, sir; as my interest may appear.

Exam. CLIFFORD: Any other appearances? Let the record show no response.

Mr. CASSELL, do you care to make a brief introductory statement before proceeding?

Mr. CASSELL: The application before the Commission to-day concerns the acquisition by the Rock Island Motor Transit Company of the interstate operating authority of the Frederickson. The operation to be acquired, subject to the approval of the Commission, runs parallel to the Rock Island Railroad from Omaha along what is known as their Harlan branch and Carson branch and through Avoca to Atlantic, Ia. It just so happens at the present time that all the points that Mr. Frederickson serves are also points and stations on the Rock Island Railroad.

472 Therefore, our acquisition seeks to acquire the entire operation. There will be no abandonment of any points or place; the service will be continued to all points and places now served. There is no point any distance whatsoever from the Rock Island railroad as all points are on it. I believe with this brief statement that we may proceed with the testimony, as it is a more

or less simple matter and will become quite clear from the testimony of the witnesses.

Exam. CLIFFORD: As I understand it, you are not purchasing all the operating rights?

Mr. CASSELL: All of his common carrier rights.

Exam. CLIFFORD: The general commodity rights, is that correct?

Mr. CASSELL: Yes.

Exam. CLIFFORD: He has a specific commodity authority, doesn't he?

Mr. CASSELL: He has an authority as a furniture mover, which is to be retained.

Exam. CLIFFORD: And also livestock.

Mr. CASSELL: Livestock, that is to be retained, but he is transferring all of his general commodity common carrier authority.

Exam. CLIFFORD: It is your understanding he is going to continue to operate in connection with these other commodities?

473 Mr. CASSELL: It is my understanding, and I believe Mr. Frederickson will so testify. He is here today and will be put on the stand.

Exam. CLIFFORD: In any event, your application is to purchase all of his general commodity regular route operations.

Mr. CASSELL: That is correct.

Exam. CLIFFORD: Call your first witness.

Mr. CASSELL: Before we proceed, I would like to have for identification an Iowa map, marked Applicants' Exhibit No. 1, and also a record showing the population of cities and towns, marked Applicants' Exhibit No. 2.

(Marked for identification "Applicants' Exhibit No. 1 and Applicants' Exhibit No. 2, Witness Peterson.")

Mr. CASSELL: No statement has been made as to the application and exhibits attached thereto. I should like to have the privilege of referring to the application and exhibits attached thereto, unless there is objection, as though a part of the record.

Exam. CLIFFORD: The rules of practice provide that the application and all exhibits are in evidence unless specifically challenged by opposing parties, and I would presume you have no opposition, at least none has appeared today.

WM. F. PETERSON was sworn and testified as follows:

Direct Examination.

474 Q. (By Mr. CASSELL) What is your name and position?

A. My name is Wm. F. Peterson, and my business address is 402 Plymouth Building, Des Moines, Ia. I am employed by Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company, as special assistant to the Chief Executive Officer, and I am employed by The Rock Island Motor Transit Company as its General Manager.

Q. How long have you been so employed?

A. Since 1937.

Q. Have you any previous motor carrier experience?

A. Yes. I operated my own common carrier truck lines from 1928 to 1937.

Q. In your present capacity are you required to be familiar with the entire operations of The Rock Island Motor Transit Company?

A. Yes, sir.

Q. Are you also required to be familiar with the co-ordinated service effected by The Rock Island Motor Transit Company and the parent company, the Rock Island Railroad?

A. Yes, sir.

Q. Did you take part in the preparation of the application which is being heard by the Commission today and execute it for and on behalf of The Rock Island Motor Transit Company?

A. Yes, sir.

475 Q. Is there a map attached to the application which shows the operations of the Rock Island Railroad and of the Rock Island Motor Transit Company, together with the operations under consideration today?

A. Yes. It is Exhibit C-9 as attached to the application.

Q. What does it show?

A. The black lines indicate the rail lines of the applicant's senior affiliate, the Rock Island Railroad. When I say Rock Island Railroad, I am, of course always referring to Joseph B. Fleming and Aaron Colnon, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company. The red lines on the map indicate the present operations of the applicant, the Rock Island Motor Transit Company. The yellow lines indicate the routes for which applications have

been made before the Interstate Commerce Commission. The solid purple line indicates the route which The Rock Island Motor Transit Company in this proceeding seeks to acquire from J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson and Son. The Rock Island Motor Transit Company is to acquire, subject to the approval of the Commission, the entire interstate motor carrier operation of the Fredericksons. No rights are to be retained by the Fredericksons. The small green line between Kansas City and St. Joseph, Missouri, represents a truck route which is covered by "grandfather" 476 rights under an application filed by The Chicago, Rock Island and Pacific Railway Company.

Q. When you say the entire operations of the Fredericksons, that they are to be acquired, that needs a little qualification, are they not retaining a certain specific commodity authority?

A. Yes, we are only acquiring his common carrier general commodity rights.

Q. Regular route.

A. Regular route operation. He is to retain all other rights which he possesses. As far as I know, he has furniture rights and rights to haul cattle, and probably several other commodities.

Q. That is specifically shown on Exhibit B-5 attached to the application, is it not?

A. Yes.

Q. Are there any corrections or additions to be made as to this map, Mr. Peterson?

A. Yes. A yellow line is shown between Bucklin and Liberal, Kan. This covered an operation filed in Docket No. MC 29130 Sub 6. Since this map was prepared, this application has been denied, and the yellow line as shown, therefore, should be omitted. There should be a yellow line between Kansas City and St. Louis, approximately paralleling the Rock Island rail route which covers authority sought under Docket No. MC 29130 Sub 34. The 477 Rock Island Motor Transit Company has a favorable order covering that operation shown in yellow west of Des Moines to Dexter, as shown on this map, and also up through Guthrie Center, but it is still shown in yellow as the order is not effective until November 26, and consequently the applicant is not yet operating.

Q. I show you a map which has been marked Applicant's Exhibit 1, and ask you what it is.

A. This is a highway map of the State of Iowa and a small portion of the adjoining territory which shows the highways, routes and other details under consideration in the present application.

Q. Will you describe it in more detail.

A. The red line on the map indicates the rail lines of the Rock Island Railroad. The blue lines indicate the truck routes operated by The Rock Island Motor Transit Company. The green lines indicate those routes for which applications have been filed by The Rock Island Motor Transit Company, and the yellow lines in the lower left-hand corner of the map cover the authority sought to be acquired from the Fredericksons in the present application.

Q. Will you describe how the proposed acquisition will fit into the present operations of The Rock Island Motor Transit Company?

A. As can be seen from Exhibit C-9 and Exhibit 1, if the proposed acquisition is authorized, the applicant, The  
478 Rock Island Motor Transit Company, will then have authority to serve every Rock Island rail town between the east and west lines of the State of Iowa along the main east-west line of the Rock Island Railroad, that is, when it is taken together with the present operations and the rights which are pending in Sub 26, which I mentioned before. As can be seen from Exhibit 1, the Fredericksons' authority exactly parallels the Rock Island Railroad between Atlantic and Omaha, including the Harlan branch and the rail line between Avoca and Oakland.

Q. That is known generally as the Carson branch?

A. That is right.

Exam. CLIFFORD: There is a segment of the route, it appears to me, between Oakland and Atlantic that is not on the railroad, is that correct?

Mr. CASSELL: That is right. That may be explained, Mr. Examiner, in that there are no points served by the Fredericksons in that segment. It is an operating right only and, as will be brought out later, The Rock Island Motor Transit Company is at present operating over Highway 6 so there will be a consolidation of the present operation of The Rock Island Motor Transit Company with the operation of the Fredericksons.

Exam. CLIFFORD: You mean The Rock Island Motor Transit Company has authority over that same identical  
479 route, is that it?

Mr. CASSELL: If you will look at Exhibit 1, the blue lines indicate the present operation of The Rock Island

Motor Transit Company and the yellow lines that of the Frederickson rights, and you will notice there are no towns along the whole distance from Oakland to Atlantic so no points are served by the Fredericksons along that territory.

Exam. CLIFFORD: That is used as an alternative route, I presume.

Mr. CASSELL: That is an operating route.

Exam. CLIFFORD: The Rock Island Motor Transit has authority presently to use that route?

Mr. CASSELL: Presently has authority and is using it extensively.

Exam. CLIFFORD: There would be just a merger of that operating authority?

Mr. CASSELL: That is right.

Exam. CLIFFORD: Is it true every point served by the vendor here are also stations on the Rock Island Railroad?

Mr. Cassell: That is correct.

A. It just happens that the Frederickson authority is only into towns served by the Rock Island Railroad, and they serve all Rock Island rail points in this territory with the exception of Corley. An application has been filed under Docket No. 29130 Sub 33 covering the one point of 480 Corley, so that between the present application and the Corley application, if both are approved, The Rock Island Motor Transit Company will have the authority to serve all Rock Island rail points in the area.

Exam. CLIFFORD: Where is Corley?

Q. Where is Corley, Mr. Peterson?

A. Corley is a small town situated about half way between Harlan and Avoca.

Q. It appears on Exhibit 1?

A. It appears on Exhibit 1 and is approximately one half mile off the main highway to the East.

Q. It is on the Rock Island Railroad?

A. It is stationed on the Rock Island Railroad.

Q. What is the population of Corley?

A. To the best of my ability to judge, it is about fifty, maybe twenty-five would cover it.

Q. Is there any duplication of present operations, Mr. Peterson?

A. Yes. As can be seen from Exhibit 1, the Frederickson's authority and the present operation of the Rock Island Motor Transit Company are over the same highway between Oakland and Atlantic, that is, over U. S. Highway.

6. However, there are no towns on this 28-mile stretch served by the Fredericksens so that there will be a consolidation of operating mileage only. Of course, 481 there is also the duplication of the highway rights between Council Bluffs and Omaha, which is the terminal mileage across the Missouri River.

Q. Will the proposed routes be used under any plan of coordinated service with the applicant's senior affiliate, the Rock Island rail lines?

A. Yes. The Rock Island Motor Transit Company operates and works very closely with the Rock Island rail lines in the matter of furnishing coordinated service. Coordinated service will be instituted over this territory in the same manner in which it has been used elsewhere.

Q. What has been your experience in regard to the effect of coordinated service, Mr. Peterson?

A. We have found that through coordinated service with the Railroad we have been able to greatly expedite shipments in every place where it has been put into effect. The saving in time to shippers has been any way from a minimum of a day to a maximum of two or three weeks. The coordinated service program of The Rock Island Motor Transit Company and the Rock Island rail lines was in effect prior to the present National emergency and had shown great operating advantages through its use. But since the beginning of the war, and particularly since the creation of the Office of Defense Transportation and the issuance of its various orders, coordination has been intensified and 482 the need for it has been enlarged. Where coordinated service is now in effect, it has demonstrated its value,

both as to the conservation of equipment and the improvement in service, which I mentioned before. As there is coordinated service in the adjoining territory, both in Nebraska and in Iowa, the towns under consideration today are at a comparative disadvantage. With the approval of this application and the institution of service, they will then have available to them the same advantages as the other towns now have. Furthermore, it is, of course, wasteful of equipment of both the Railroad and the Motor Transit Company to require the Railroad to tie up its equipment for this small area while the Motor Transit Company is running many scheduled runs along Highway 6 immediately to the south, which, without any additional equipment being added, could be rerouted to cover the routes under consideration without the addition of any equipment or the impair-

ment of service anywhere along the line. The majority of these points are small farming communities which naturally have not attracted a great deal of transportation service. With the approval of this application they will have brought to them for the first time single-line motor common carrier service from most of the major shipping and distribution points of the Middlewest, such as Chicago, Tri-Cities, Twin Cities, Kansas City and, although it is intrastate as far as this application is concerned, Des Moines. Of course, 483 it will be merely continuing the present operation so far as service to and from Omaha is concerned, but it will afford an extension on into Nebraska as shown on Exhibit C-9. By virtue of having a single-line service to the larger distribution points, interlining and needless waste of equipment for short-hauls, with the consequent opportunity for loss and damage to accrue to shipments, will be eliminated. These are advantages which are inherent in a single-line service and of which the Commission is well advised.

Q. What is the intention of the applicant with regard to acquiring any of the operating property of the transferor?

A. As will be seen from Exhibit C-1, which is a copy of the contract between the parties, upon the approval of the acquisition The Rock Island Motor Transit Company will acquire three pieces of equipment, namely, one tractor and semi-trailer and one truck.

Q. Is there any other equipment to be transferred in the way of real estate, buildings or such equipment?

A. No.

Q. Does the Rock Island Motor Transit Company have other equipment available to assign to the operation under contemplation other than that being acquired from the Fredericksens?

A. Yes. We have at the present time roughly 325 units. Our operations over Highway 6 are one of the heavier of our operations, so that, with our equipment available and 484 already operating in the vicinity, we will readily be able to accommodate any of the needs of this territory with additional equipment.

Q. What is the intention of the applicant in so far as the employees of the transferor are concerned?

A. The Fredericksens themselves are engaged in other enterprises and are not interested in becoming associated with The Rock Island Motor Transit Company. It is our intention, however, to take over such of the employees of

the Fredericksens as were engaged in their operation so far as may be practicable and so far as such employees may desire to become associated with The Rock Island Motor Transit Company. As you know, there is a shortage of employees at the present time, and so we would be more than glad to take any who will come.

Q. You have mentioned, Mr. Peterson, that there are no regular route common carriers serving the large distribution points into this territory. There are other motor carriers, however, operating into most of these points, are there not?

A. Yes.

Q. Could you name some of those carriers?

A. There is the Robert Bros. Lines, with headquarters at Audubon, the Iowa-Nebraska Line, which operates through most of this territory, the Union Transfer operates over a goodly portion of the territory, Watson Bros. hits 485 part of the territory, the Merchants Motor Freight of Minneapolis covers a part of the territory, and there is an endless stream of irregular operators serving a radius of 25 or 50 miles in this section of the country.

Exam. CLIFFORD: May I interrupt to inquire whether you propose to purchase the corresponding intrastate rights over the route?

Mr. CASSELL: Yes.

Q. (By Mr. CASSELL) The Rock Island Motor Transit Company then is not seeking to acquire the sole motor common carrier in the territory?

A. It is not.

Q. There is no attempt, therefore, to restrain competition as a result of this purchase?

A. No.

Q. What is the intent and effect of this acquisition?

A. As can be seen from Exhibit C-9 and Exhibit 1, it is to complete and round out the applicant's authority in this territory and to complete Rock Island Motor Transit Company service to all Rock Island rail points in this territory.

Q. What have you to say in regard to the history of the applicant?

A. I do not believe it is necessary to refer at length to the history of The Rock Island Motor Transit Company, its operating rights or authority, as this has been 486 gone into in numerous cases before this Commission in the past. It particularly appears in the records of Dockets MC-F-1305 and MC-F-1327. There is likewise a complete and detailed exhibit attached to this application showing this history. I refer to Exhibit A-6.

Q. Is there a similar application to be filed before the Iowa State Commerce Commission for the acquisition of intrastate rights similar to the interstate rights before the Commission today?

A. Yes.

Exam. CLIFFORD: The contract states that it is proposed to acquire the intrastate rights of the seller, if any; now I wish to have you clarify that, does he possess intrastate rights at the present time?

A. Yes, he has intrastate rights in Iowa, and we are to acquire the intrastate rights in Iowa.

Exam. CLIFFORD: Do you know the number of the certificate?

A. I don't know the number of the certificates offhand. It is possible Mr. Frederickson can supply that.

(Recess was taken at 10:10 to 10:20 A. M.)

Exam. CLIFFORD: All right, gentlemen, let us resume, please.

Q. (By Mr. CASSELL) You were asked, Mr. Peterson, what the Iowa State docket number was. Have you  
487 now before you a copy of Mr. Frederickson's Iowa certificate, a certified copy?

A. Yes.

Q. Will you read the docket number in which that was issued?

A. Docket H-3265.

Q. Will you read the caption of the resolution?

A. Resolutions amending certificate of convenience and necessity, No. 493.

Q. 493 is the Iowa certificate number of Mr. Frederickson's rights?

A. That is right.

Q. These intrastate rights are similar in extent to the interstate authority before this Commission today.

A. That is correct.

Q. These intrastate rights are to be secured by the same contract to purchase from the Fredericksons?

A. Yes.

Q. Are these to be acquired by purchase from the Fredericksons?

A. Yes.

Q. The purchase price then shown in the contract of purchase as Exhibit C-1 covers both the intrastate and the interstate rights?

A. Yes.

Q. What service is it proposed that The Rock Island

Motor Transit Company will afford in the territory  
488 involved should the application be approved?

A. The applicant will not only continue in effect the service now rendered by the Fredericksens, but will improve upon it. It is our intention to render daily service. At the present time there are some 5 or 6 scheduled runs over Highway 6. Any one or more of these runs may be rerouted to cover the points under consideration to give all the service that is required. We, therefore, already have available in the neighborhood equipment to afford more service than this area could actually require in the foreseeable future. And, of course, we will also bring to this territory for the first time a coordinated service with the Rock Island Railroad, an entirely new service not heretofore available. This last will materially improve the service of these communities.

Q. As I understand it, Mr. Peterson, as can be seen from Exhibit C-1, you are operating over Highway 6 some 5 or 6 scheduled runs, and you would reroute some of these runs over the yellow lines and would not even add materially to the mileage?

A. Whenever it would be necessary the trucks moving over Highway 6 could without a doubt be rerouted around by this route with not to exceed 15 or 20 miles additional travel.

Q. So it would be a relatively simple operation for you to fit it into your present schedule?

489 A. It would.

Q. I hand you a document which has been marked for identification Applicant's Exhibit 2 and ask you what it is?

A. Exhibit 2 shows the towns to which service is requested under this application which are not now being served by The Rock Island Motor Transit Company, and the population of those towns. This is a list of towns now served by Fredericksen, which we are to acquire, and showing the population of these various towns.

Q. What is the meaning of the star in front of certain of the towns named on Exhibit 2?

A. The star indicates those towns in which the Rock Island Railroad now maintains station facilities.

Q. Has this latter fact any particular significance in so far as this proceeding is concerned?

A. Yes. Whereas, the Fredericksens had terminal facilities only at Harlan, Ia., and Omaha, Nebr., The Rock Island Motor Transit Company will have available to it all of the

station facilities of the Rock Island Railroad. As can be seen from Exhibit 2, this will be of material benefit to many of the communities over the present situation as it will mean several additional terminal facilities or stations available.

Q. As a matter of fact, it means—

A. Ten additional stations.

Q. Nine additional stations, as he already has one at Harlan?

490 A. Yes.

Q. As a matter of information for the Commission, have you prepared a breakdown of the purchase price, showing what portion is to be allocated to equipment, what portion to the interstate rights, and what portion to the intrastate rights?

A. Yes, I have. Exhibit C-1 shows that the purchase price of the entire acquisition of \$6,500.00. Of this figure Exhibit C-2 shows that which is to be used as to the equipment, namely, \$3,000.00. Of the remainder of \$3,500.00, the interstate rights have been valued at \$1,750.00, and the intrastate rights at an equal amount.

Exam. CLIFFORD: The intrastate, valued at what?

Mr. CASSELL: \$1750.00.

Exam. CLIFFORD: And the interstate?

Mr. CASSELL: The same figure.

Exam. CLIFFORD: And the equipment?

Mr. CASSELL: \$3,000.00.

Exam. CLIFFORD: How many pieces of equipment?

A. One semi-trailer unit and one truck.

Q. (By Mr. CASSELL) By the semi-trailer unit, you mean a tractor and a trailer?

A. A tractor and a trailer.

Q. (By Exam. CLIFFORD) What is the value of this equipment?

A. \$3,000.00, we set it at.

491 Q. Does that make the full purchase price?

A. \$3,000.00, plus the two \$1,750.00 makes the full purchase price.

Q. How did you determine the value of the equipment?

A. Well, at the time the contract was signed,—I believe it is a reasonable appraisal. Today used equipment is worth considerably more. We are paying today for a new tractor and one tractor alone, better than \$3,000.00.

Q. (By Mr. CASSELL) What does the automotive equipment consist of?

A. The equipment is detailed on Exhibit C-2 and shows that there is a 1936 International truck, panel body, a 1938

International tractor, and a Fruehauf 1938 semi-trailer. The value of the operating equipment as shown on Exhibit C-2 is an estimated value taken from appraisals. They will be taken into the accounts of The Rock Island Motor Transit Company at this figure upon their being transferred.

Mr. CASSELL: Does that make is clear?

Exam. CLIFFORD: When I asked him the question a while ago, he said there was only one semi-trailer and one truck, and this latter answer includes three vehicles, does it not?

Mr. CASSELL: There is a truck and a tractor and a trailer.

Exam. CLIFFORD: One tractor-trailer unit and a straight truck?

Mr. CASSELL: Yes.

492 A. That is right.

Q. (By Mr. CASSELL) Is there anything else, Mr. Peterson, you care to add in regard to the nature and character of his operation?

A. I don't believe there is.

Mr. CASSELL: I tender the witness for cross examination.

#### Cross Examination.

Q. (By Exam. CLIFFORD) Mr. Peterson, in connection with this operation, I presume it is the purpose of the Rock Island Railroad to coordinate its rail-truck service with its proposed truck service over this route in question, is that correct?

A. Yes, that is our intention.

Q. I don't think you explained, although you may have another witness, as to how this coordination will take place.

A. We have a rail witness here who will explain the present rail service and give examples of how traffic will move in coordinated service.

Q. Is it proposed as a result of this transaction, to provide an all-motor service over this route unrelated to the rail service?

A. It is, yes.

Q. Now, have you given any consideration to the fact as to whether it would be practical to confine  
493 the operation over this route to movements involving a prior or a subsequent rail haul?

A. It would be absolutely impractical to operate this route with that type of restriction inasmuch as you can appreciate any shipment moving out of Omaha under that type of authority or restriction would have to move in a box car across the river and then be picked up and delivered, which would make it expensive and absolutely impractical as an operating feature.

Q. (By Mr. CASSELL) You would have service, then, Mr. Peterson, to a point like Weston which is some 11 miles from Omaha, if you had a prior or subsequent rail haul, you would have to take it a longer distance by rail than the entire distance for the traffic to be moved in order to move it at all by rail, and it would involve considerable back-hauling, would it not?

A. It would just be an impractical operation because the haul is short and you would just tie up rail equipment for the railroad, which the railroad needs in its general operations today probably more than ever before, and any prior or subsequent movement by rail in this operation would just hamstring the operation.

Q. (By EXAMINER CLIFFORD) Now, this route, as I understand it, is on your main line between Des Moines and Omaha, is that correct?

494 A. That is right. The biggest share of the main line of the railroad runs from Atlantic through Walnut, Avoca and parallels the route down to Council Bluffs. The two branches involved are out of Avoca, one running north to Harlan and the other running south to Avoca and Carson. Both those branches tie into the main line at Avoca.

Q. Just how do you propose to conduct that particular operation, Mr. Peterson?

A. We have at the present time trucks stationed at Atlantic that operate between Omaha and Atlantic. These trucks can take care of the intermediate peddling whenever necessary. We also have through trucks, six schedules a day operating between Omaha and Des Moines. You can appreciate it would not make a great deal of additional mileage to route those trucks from Atlantic through Avoca and around that route than through Oakland.

Q. Do you have intermediate authority, intermediate point authority between Atlantic and Council Bluffs over Highway 6?

A. We have authority to Oakland, the only town on Highway 6, and Griswold to the south on state Highway No. 100.

Q. That route is removed from the railroad at the present time, is it not?

A. Yes, it is the main highway from Atlantic to Council Bluffs,—the main highway is Highway 6. However,  
495 this highway north is a paved, all-weather highway all the way as well.

Q. You will continue your main operation over Highway 6, will you not?

A. Yes.

Q. That is between Atlantic and Council Bluffs?

A. Via Oakland, yes.

Q. These towns that are involved in this transaction are comparatively small communities, are they not?

A. Yes, as noticed from the Exhibit 2, I believe it is, the largest town is Harlan with 3726 people, Avoca 1598, Walnut, 900, and so on down to Weston with 77.

Q. I think you stated previously in your testimony that all these towns have available other motor carrier service, is that correct?

A. Yes.

Q. Are there any of them that do not?

A. As far as I know, there are not any that do not have it.

Q. Now, getting back to the transaction, I presume you were the one that conducted the negotiations leading up to the signing of the agreement?

A. Yes, sir.

Q. Did you contact Mr. Frederickson?

A. I did, yes.

Q. How did you arrive at the purchase price?

496 A. Well, just a matter of argument, I would say, a matter of give and take.

Q. Do you feel the purchase price is a reasonable price for the rights you seek to acquire?

A. I think it is, yes.

Q. Do you feel that the return on your investment will be a reasonable return in view of the comparatively light territory that is served?

A. Well, inasmuch as we can handle it in the manner we can handle it, due to the fact we can route various trucks over this road without a doubt there will be lots of times when the trucks might otherwise move empty that they can be loaded and moved to capacity.

Q. Do you have a terminal at Atlantic?

A. Yes, we maintain a terminal at Atlantic.

Q. I presume your plan, if you do have traffic for these small points on the rail line between Atlantic and Omaha, that you break bulk there at Atlantic, is that your plan?

A. Not necessarily. No, our plan is to serve this territory out of Des Moines and Council Bluffs and Omaha. We do have a terminal at Atlantic though.

Q. (By Mr. CASSELL) You are speaking now of the motor transit operation?

A. The Rock Island Motor Transit Company has a terminal there.

Q. (By Exam. CLIFFORD) You operate a through truck service, do you not, through Des Moines to Omaha at the present time?

A. Yes.

Q. In connection with that through truck service, how would you service this territory?

A. In all probability, it would be served out of Des Moines and Omaha. Now, there is a possibility,—we do have equipment stored at Atlantic that makes turnaround runs from Atlantic to Omaha. It is very possible this equipment might be used in connection with this operation.

Q. I mean a movement, say from Des Moines to Omaha, and if you had any traffic destined to points on the routes of the vendor, would you highball into Omaha and work back, or would you stop at Atlantic and distribute from Atlantic.

A. That would be distributed out of regular points, operating out of Des Moines.

Q. (By Mr. CASSELL) As an intermediate point?

A. As an intermediate point, yes.

Q. (By Exam. CLIFFORD) That would necessitate a change in your present operation, would it not?

A. No, not necessarily, because these trucks here, we have at least three schedules a night moving out of Des Moines to Omaha. Any one of these three schedules can be routed via the north route out of Atlantic as well as Oakland, and they can drop shipments at any point along the highway.

Q. It is my understanding this Highway 6 between Atlantic and Omaha is more or less an express route. There is only one point, Oakland, you are authorized to serve, isn't that correct?

A. Oakland, Lewis and Carson are three Rock Island points there on the south route. There are four; plus Griswold.

Q. You see what I am driving at is to find out just how you propose to continue your operation over these two routes, the one you propose to acquire here and the one you are presently authorized to operate over.

A. As I said before, we have three regular schedules through there. We maintain a peddler at Atlantic. We

have three trucks stationed at Atlantic that peddle between Council Bluffs and Atlantic. One of these trucks goes as far as Anita, at which point it meets a peddler truck coming out of Des Moines. Now, any of these units can be used with this peddler service. One day you may use one and the next day you may use all three of them. This equipment stationed at Atlantic can be used in this area here, the north and south route. We have the through trucks going back and forth which can be routed over the territory and will be routed according to the condition of the highway. Actually the route, as far as the north route is concerned, you don't have by near the hilly condition and the grades you have on the south route.

Q. Is the flow of traffic eastbound from Omaha, or 499 westbound to Omaha?

A. We find a pretty well balanced operation as far as Omaha and Des Moines. You will find, however, out of Omaha and Council Bluffs to Atlantic and those smaller points, and the peddler who hauls finds the flow from the large cities to the small towns with very little, if any, traffic moving back.

Q. Now, this purchase price of \$6,500.00, how much of that has been paid?

A. There has been paid \$1.00.

Q. How is the balance to be paid?

A. It will be paid in cash.

Q. The entire amount in cash?

A. The entire amount in cash.

Q. Upon approval by the regulatory bodies?

A. By the regulatory bodies; yes, sir.

Q. Now, in connection with the valuation of the equipment did you personally make the valuation or did you have someone else do it, some independent appraiser?

A. I personally valued the equipment.

Q. You feel the value you place on it is a reasonable value? What is the basis of your valuation, that is what I want. In other words, you say you did not employ an independent appraiser to look the equipment over, and obviously any valuation you might place might be 500 prejudiced somewhat, and I was wondering why you feel \$3,500.00 is a reasonable price.

Q. (By Mr. CASSELL.) You purchased a great deal of equipment on behalf of the Rock Island Motor Transit Company, did you not?

A. About the time this transaction was made, we purchased from the Brady Truck Line about 20 pieces of

used equipment, and that equipment,—this equipment was based on approximately the same value. Today, of course, used equipment is what you can get for it. It is extremely high. I believe the valuation as placed there today is within reason. If that was prior to war conditions, it would be too high, but today I believe it is within reason.

Q. Is the equipment serviceable?

A. When last I saw it, yes, it was very serviceable and in use.

Q. There would not have to be any considerable sum expended to place it in repair for use by your operation?

A. At the time the contract was made the equipment was in good serviceable road condition.

Exam. CLIFFORD: That is all.

MR. CASSELL: That is all.

(Witness excused.)

Exam. CLIFFORD: Call your next witness.

WALTER M. WHARTON was sworn and testified as follows:

501 Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. Walter M. Wharton.

Q. What is your business or occupation?

A. Manager of the Transportation Department of the Omaha Chamber of Commerce. I have been with the Chamber of Commerce since 1918. The Transportation Department of the Omaha Chamber of Commerce is organized for the purpose of protecting the transportation interests at Omaha and our trade territory.

Q. As such you are required to be familiar with the transportation agencies in and about Omaha and its trade territory?

A. Yes, sir.

Q. I think you are familiar, are you not, with the operations of the Rock Island Railroad and the Rock Island Motor Transit Company?

A. I am.

Q. You also know the Frederickson & Son Truck Line operation out of Omaha and into Harlan, Avoca, and Atlantic, Ia.

A. Yes, sir.

Q. You are familiar, are you not, with the contemplated purchase by the Rock Island Motor Transit Company of the rights of J. H. Frederickson & Son?

A. I am.

Q. You are also familiar with the program of co-ordinated service of the Rock Island Motor Transit Company and the Rock Island Railroad as it has been placed in effect elsewhere?

A. I am.

Q. As a matter of fact, you have a coordinated service out of Omaha into Nebraska points?

A. Yes, sir.

Q. And also back east into Iowa at the present time, do you not?

A. Yes, sir.

Q. Has that service been of any advantage to the shippers in Omaha?

A. It has.

Q. In what way?

A. Gives them faster service than they had before, in a great many instances, and a more reliable service.

Q. Has the truck service of the Rock Island Motor Transit Company been a reliable and dependable service?

A. So far it has been very reliable and dependable.

Q. Which the shippers of Omaha like to have available for them?

A. Yes, sir.

Q. What can you say in regard to how this proposed acquisition will affect shippers in Omaha? Will it be of any benefit to them?

503 A. Well, it will give them—we have at the present time, of course, service over there. We have the rail service, but this will give us a coordinated service much faster than the rail. It will give us an overnight service and next morning service into these points which we sometimes do not get now. I believe we have three motor carriers.

Q. The earliest you get has been third day?

A. Yes.

Q. (By EXAM. CLIFFORD) You are speaking from where?

A. Omaha, to these points by rail.

Q. Third day?

MR. CASSELL: Can't even make third day sometimes.

Q. You are only a few miles from Omaha?

A. Sixty miles; we can walk it.

MR. CASSELL: That will be explained by a rail witness now that has to operate.

A. Have to haul it over and back.

Q. (By MR. CASSELL) By having available coordinated

service this will be almost a classic example of improvement in service?

A. As a result of coordination; yes, sir.

Q. You believe that will be of material benefit to the citizens of Omaha and the shipping public?

A. Yes.

Q. As well as out in the destination territory?

504 A. Yes, our trade territory.

Q. Do you think they will support this operation if it is placed in service?

A. Yes, sir.

Q. Have you been instructed to appear before here in support of it?

A. Yes, sir.

Q. Have you anything else to add, Mr. Wharton?

A. No, I don't believe so. We are very much interested in the coordination of service and the saving of truck miles and the saving of box cars as a result of it. The O. D. T. orders at the present time, of course, require rail carriers to hold up the traffic for so many days and are not required and allowed to ship unless they have full cars. They are supposed to turn it over to the motor carriers. I presume in this instance with coordinated service, instead of holding shipments for two or three days until they get a carload, they will send it out daily by motor carrier.

Mr. CASSELL: That is right.

#### Cross Examination.

Q. (By Exam. CLIFFORD) Are all those points, Mr. Wharton, within the trade territory of Omaha?

A. I will say so, only sixty miles. We go clear across the state of Iowa.

Q. They are all small communities?

A. Very small.

505 Q. Except Harlan with a population of 4,000 people.

A. Yes.

Q. Do you know what the existing service is, provided to these points, either by rail or motor carrier?

A. Yes, we have rail service.

Q. Other than the Rock Island?

A. No other line except at two points, I believe, are served by other than the Rock Island.

Q. Which of these two points are served by other rail carriers?

A. Oakland and Griswold. That is not up on this new line. It is Oakland.

Mr. CASSELL: Oakland is at the present time served.

A. You have got one Milwaukee station on there and one Northwestern station.

Q. (By Mr. CASSELL) What points are they? Exhibit 2 gives the points covered by the application.

A. This Exhibit 2 shows the Rock Island stations.

Q. Also shows the points that will be served by the operation, and has all points to be served where there is a Rock Island rail station.

A. They are all Rock Island. I am not sure which ones they are. I looked on the map a while ago and I find one served by the Milwaukee and one by the Northwestern, but all are served by the Rock Island.

Q. (By Exam. CLIFFORD) They are all served by the Rock Island?

506 A. Yes, sir.

Q. I was just wondering what other service is available in that territory. Is there a considerable amount of truck service there at the present time?

A. Well, there are three small truck lines, yes, that serve some of the points.

Q. You say some of the points. Are all of these points dependent upon service either by the Rock Island or some other truck line?

A. Yes, dependent upon service by the Rock Island or the vendor in this case.

Q. In other words, what I am trying to develop is the adequacy of the existing service in the territory. How many other truck lines so far as you know, operate and serve the points involved here.

Q. (By Mr. CASSELL) All into the territory, but no one

A. There are about six truck lines serving these points. truck will serve all the points.

A. No one truck will serve all the points except the vendor.

Q. In each one you could find another carrier into them?

A. Yes.

Q. (By Exam. CLIFFORD) Do you think there is sufficient available business in that territory for new operators such as Rock Island Transit Company?

A. I don't consider that a new operation. They  
507 are taking over a present operation.

Q. Well, no. I mean the effect this transaction may have on the existing motor carriers serving those

points. They are rather small communities and I am just wondering just what your view is with respect to a large operator like the Rock Island Motor Transit Company, supported by the resources of the railroad, what effect their entry into this territory would have on existing truck lines.

A. I don't think it will unduly eliminate competition.

Q. I mean, do you think it would have a detrimental effect on existing truck operations in that territory?

A. No, I don't believe so. They all seem to have their friends in that territory and they will pretty much retain the traffic, but their truck line will take what is now getting very slow service via rail.

Q. In other words, if such were the case, they probably would have been here today, I presume?

A. Yes, sir.

Q. (By Mr. CASSELL) Mr. Wharton, you mentioned several towns had rail service other than the Rock Island?

A. I thought there were two towns.

Q. Harlan has the Northwestern, isn't that right? Harlan, Ia.

A. Yes.

Q. Minden has the Milwaukee?

A. Yes, sir.

508 Q. Does not Underwood have the Milwaukee, too?

A. Yes, I believe it does.

Q. I think those are points served by other railroads.

A. Yes.

Q. (By Exam. CLIFFORD) Let me inquire a little further. You are familiar with this territory. Is this largely an agricultural district?

A. It is totally an agricultural district. It is one of the most fertile territories in the United States. They will raise a hundred bushels of corn to the acre through this territory.

Q. Largely agricultural?

A. Agriculture and livestock.

Exam. CLIFFORD: That is all. Thank you.  
(Witness excused.)

J. J. HARTNETT was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. J. J. Hartnett.

Q. You are with Paxton & Gallagher Company?

A. Yes.

Q. Wholesale groceries?

A. Wholesale groceries, and wholesale hardware, and a large coffee business, wholesale.

Q. You are the traffic manager of that concern?

A. Yes, sir.

509 Q. How long have you been associated with Paxton & Gallagher Company?

A. Since January 1932.

Q. How long have you been in the position you now hold?

A. During that whole period.

Q. During that time, of course, you have been required to familiarize yourself with the transportation facilities available to your trade territory?

A. That is right.

Q. What is your trade territory?

A. Well; we serve all of Iowa with our coffee distribution, and about better than half the state going east with hardware and groceries. We get into all the surrounding states, Minnesota, South Dakota, Colorado, Wyoming, and of course, all of Nebraska, North Kansas and a part of Colorado.

Q. Yours is a large concern, distributing to several States with Omaha as its center?

A. That is right.

Q. As far as the territory under consideration today, which is from Omaha as far east as Atlantic, that is your trade territory for all of your products, is it not?

A. Well, Yes, I will answer that all products go into there.

Q. You are interested in having transportation into your territory, into this territory, for all your complete line of merchandise?

510 A. Yes.

Q. You are familiar, I presume, with the Rock Island Railroad and its service at the present time?

A. I am.

Q. And with the service of the Rock Island Motor Transit Company in and out of Omaha?

A. Yes.

Q. I believe you probably also know of Frederickson & Son in their present operation?

A. We use them.

Q. Have you seen Exhibit 1, showing in yellow the route of the Fredericksens out of Omaha and through the territory under consideration?

A. Yes.

Q. You know that the case before the Commission today is an application by the Rock Island Motor Transit Company to acquire that interstate authority?

A. I do.

Q. Will you use the service of the Rock Island Motor Transit Company, or rather, are you using it at the present time?

A. Yes, we are using it.

Q. You have it available out of Omaha westbound, do you not?

A. Yes.

Q. Also eastbound?

A. Also eastbound.

511 Q. Has that been a satisfactory service?

A. Very satisfactory.

Q. And in the territory in which they now operate, they have put into effect coordinated service with the Rock Island Railway, have they not?

A. They have.

Q. Has that had any effect on the Rock Island rail service?

A. I am sure it has improved the Rock Island rail service.

Q. As a matter of fact, you have shown a saving in most cases of one or several days.

A. The service into Kansas has been greatly improved.

Q. Now, is time in transit of any concern to your company? Does it make any difference if your shipments take one day to arrive or ten days? Is that material to you or your customers?

A. Yes, it must be admitted people will wait now under the present conditions.

Q. Under normal trade conditions?

A. Under normal conditions service is very important.

Q. But even at the present time, they are probably clamoring more than ever for service now, are they not?

A. They are certainly clamoring.

Q. Their inventories are more limited than ever and whenever they can get immediate delivery, it is something they want?

A. Certainly is.

512 Q. In normal times the ability to give quick service is a matter of competitive advantage, is it not?

A. Yes, it is.

Q. Or disadvantage.

A. Well, it is certainly a disadvantage if you are out of line to the extent the Rock Island Railroad has been out of line in this particular territory.

Q. You ship hardware and coffee and groceries?

A. A full line of groceries and a full hardware line.

Q. That would move mostly in L. C. L. lots, would it not?

A. Yes.

Q. Then if it could be shown there would be a saving of approximately three days into this territory by virtue of coordinated service over the present Rock Island rail service, would that be a benefit to you?

A. Yes, of course, we will not deny the fact we do have overnight service to each one of these towns, by other carriers, small carriers.

Q. And by Fredericksons at the present time.

A. By Fredericksons at the present time.

Q. If you were using the Rock Island rail service, it would take you three days to get into this territory?

A. All of that.

Q. To cut that time from three to one day would be a material advantage?

A. A material advantage.

513 Q. Would you use the service of the Rock Island Motor Transit Company if it were available to you in this coordinated service?

A. We would.

Q. Do you think it would be an advantage to you and other shippers similarly situated?

A. I am sure it would be.

Q. Will you look at Exhibit 2. You will notice there are ten communities beginning with Harlan, the largest, Avoca, Walnut, Marne, Hancock, Shelby, Minden, Neola, Underwood, and Weston, you ship into each one of these, do you not?

A. Each and every one of them.

Q. Would you say you would have shipments going out there every day?

A. Well, just about.

Q. Into some one of those points, it would probably be every day?

A. Probably be every day.

Q. You have a considerable volume into this territory?

A. One reason why they move every day is because the hardware and grocery salesmen don't move along just together. Their routes are staggered a little, and of course, the orders follow them correspondingly, just about stretching it out so there would be some deliveries every day.

Q. You have a considerable movement then into  
514 this territory and transportation is important to you?

A. Yes, considering the size of the towns.

Q. They are good towns?

A. Good towns.

Q. Although they are small communities, they are farming centers, are they not, so they draw from a considerable territory around them?

A. Yes.

Q. Is this a well settled and prosperous farm part of Iowa?

A. Yes, it is.

Q. I take it you are appearing here today in support of this application?

A. I am.

Q. Is there anything further you would care to add as to the nature of the service?

A. Well, as I said, we do have service, but by individual small lines to different towns here. We would like to see the Rock Island Motor Transit Company take over the Frederickson line to provide at least one strong carrier in the territory.

Q. Is that of any advantage to you?

A. Yes;—don't misunderstand me,—I am not complaining about any one carrier, but as a shipper, I would like to see a strong company anywhere for reasons of safety to our merchandise and ability to trace it as we  
515 would be able to through agents. Presumably in these towns the rail agents as well as the Rock Island Motor Transit Company will have the advantage of the railroad station facilities. That would be an advantage in handling of C. O. D. shipments, claim matters and all service matters.

Q. The fact the Rock Island Motor Transit Company will have available to it the station buildings of the Rock Island Railroad, is that a material consideration to you?

A. I think it is an advantage, as I have just stated.

Q. Your shipments are perishable goods, and if left out in the wet may become destroyed?

A. Of course, I am not trying to say any one of these individual lines would do that, they do make their deliveries direct to our customers' stores, but with station facilities available to a motor carrier, anything that come up with a concealed loss after delivery, it would be much easier to account for those things and make a proper record of them if there is some agent on the ground.

Q. Then too, if the delivery is made after store hours or some things like that?

A. There is a place to leave the merchandise.

Q. To store it?

A. Yes, and C. O. D. deliveries, of course, can be handled better through agents, resident agents, of a motor line.

Mr. CASSELL: I believe that is all.

516 Cross Examination.

Q. (By Exam. CLIFFORD) How large a concern is yours?

A. Are you speaking of the capitalization?

Q. No, you are engaged in the hardware business, is that correct?

A. Yes.

Q. What other line of business?

A. Groceries.

Q. Wholesale groceries?

A. Wholesale groceries, and then we roast coffee. Our coffee business is as large as either one of the others alone. It could be a separate business.

Q. How many employees does your firm employ?

A. In this vicinity about 200.

Q. (By Mr. Cassell) You are considered one of the largest coffee merchandisers in the Middlewest, are you not?

A. Yes.

Q. (By Exam. CLIFFORD) This movement into these points involved here is rather light, is it not? They are small communities?

A. Yes.

Q. (By Mr. Cassell) Do you ship that by motor carrier or use your own trucks today?

A. We ship by common carrier.

Q. You don't have your own private trucks that make the deliveries into this territory?

517

A. We have a contract with a contract operator in the territory just beyond, and touches this territory at one point only, and that is Harlan.

Q. All other points are served by regular common carrier, is that right?

A. That is right.

Q. You say you have available service from several other lines to all these points, isn't that right?

A. Well, the Fredericksons to all of them, but at least one other to the other stations.

Q. I mean there is another truck line other than Frederickson's serving all other points?

A. That is right.

Q. You use all those lines?

A. Occasionally.

Q. Do they give you adequate service?

A. Offhand, I can't think of any particular complaints we have had on any of them.

Q. Well, now, if this transaction were approved, would you turn over all your business to the Rock Island?

A. No, I wouldn't say that.

Q. Would you turn over any of it?

A. Generally speaking, we allow our customers to choose their own carrier, make their request.

518 Q. (By EXAM. CLIFFORD) In those small communities they probably leave that up to you how they get their supplies?

A. Well, they have their favorites, the hometown man.

Q. All these trucks serving this particular territory here are local operators?

A. They are all very small.

Q. They reside in that area, isn't that true?

A. That is right.

Q. Now, would you say if this transaction were approved that your company would turn over all its business to the Rock Island?

A. I would not arbitrarily do that.

Q. By Rock Island, I mean the Rock Island Motor Transit Company. You do not use the railroad because apparently the service was not fast enough, was that correct?

A. That is right.

Q. You use exclusively in serving that territory, the truck line?

A. That is right.

Q. Now, is it your purpose, if this transaction is approved, to turn over any part of your business to the Rock

Island Motor Transit Company and divert it from these other carriers you have been dealing with for some time?

A. It is not my immediate purpose to divert traffic if this purchase should go through, but I would certainly make it a point to favor the Rock Island Motor Transit Company wherever possible with any unrouted order. That would be our preference in all cases. We would not deprive a customer of the privilege of making his selection or naming his hauler to haul a shipment thirty miles or forty miles.

Q. You are pretty much familiar with the operators, are you not, the owners and the other truck operators?

A. Yes, you know them as individuals. It is more of a man to man proposition. As long as everything goes all right, everything is all right, but that type of operator sometimes disappears overnight and his assets with him.

Q. In other words, is your firm just interested in getting another substantial operator into the territory, notwithstanding the fact you may never use it? In other words, you are interested in having an abundance of service available, is that right?

A. Yes, and the right kind.

Q. What do you mean? Will your firm use this service?

A. We will.

Q. Are you in a position to dictate the movement of the traffic from your firm into this territory? Are you the man in charge of that particular phase of the business?

A. Yes, sir.

Q. You would use it then?

A. We would use it.

520 Q. To what extent would you use it?

A. As I say, I would route all unrouted traffic over the Rock Island Motor Line in preference to anyone.

Q. What percentage of the traffic into that territory is unrouted, the routings not dictated by the consignee?

A. Perhaps fifty per cent.

Q. What would be your reason then to divert that traffic from the other carriers you are using now and giving it to the Rock Island Motor Transit Company? Is it because of their greater financial responsibility?

A. That would be it.

Q. Do you have many claims now on any of the shipments into that territory?

A. Well, no more than any other territory. We are hav

ing more claims everywhere now, shortages on what we call "hard to get" items.

Q. The point I am making, are you satisfied, is your firm satisfied with the present transportation service available to it now into this territory?

A. Well, we are getting along fairly well with what service we have there because of the restricted territory and because it is close, but I would not say we are satisfied. We would like to improve the service to this territory, and we would like to improve the responsibility feature, and ability to deal with our customers through, as I said,  
521 resident agents wherever possible. These small lines operate from the truck.

Q. If you had available this service of the Rock Island Motor Transit Company over this route and their association with the railroad, they would furnish you a much greater financial responsibility?

A. Sure.

Q. These other operators, as I understand, are awfully small?

A. They are very small.

Q. If you would have any substantial claim, it might even affect their ability to provide adequate service?

A. That is very often the case in those small companies.

Q. I presume now on these carriers, what is the relative size of these carriers, merely one or two truck operators?

A. That is it.

Q. They are not large carriers?

A. No large carriers.

Q. If they had any substantial claim filed against them, and it were proved, it might impair their ability to continue the service, I presume?

A. That is right.

Q. You are not interested,—you are interested in getting this stable carrier into that territory.

A. Yes, sir.

Exam. CLIFFORD: That is all.

Mr. CASSELL: That is all. Thank you.

522 (Witness Excused.)

O. W. LIMESTALL, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL.) What is your name?

A. O. W. Limestall.

Q. Where do you live, Mr. Limestall?

A. Des Moines, Ia.

Q. By whom are you employed?

A. Employed by the trustees of the Chicago, Rock Island and Pacific Railway Company.

Q. In what capacity?

A. As the General Superintendent of the 1st Operating District.

Q. Of what does the 1st Operating District consist? Of what is it composed?

A. The 1st Operating District is composed of four separate divisions, the Chicago, Rock Island, Des Moines and Cedar Rapids, comprising all of the lines in Illinois, Minnesota, South Dakota, and with little exception, Iowa.

Q. Does it include that portion of Iowa covered by the application before the Commission today?

A. It does.

Q. Just what are your duties as General Superintendent of the 1st Operating District?

A. I have general supervision over all of the operating and maintenance features of the district.

Q. So you are required to be familiar with train movements and merchandise movements through this territory?

A. That is correct.

Q. In your position as superintendent, are you also familiar with the program of coordinated service that has been put into effect in conjunction with the Rock Island Motor Transit Company?

A. I am.

Q. Has there been a great deal of coordinated service placed into effect in your district?

A. Yes, there has.

Q. As a matter of fact, as can be seen from Exhibit C-9, which shows by red lines the operation of the Motor Transit Company, and black lines the railroad, the railroad in Illinois is blanketed by the Motor Transit Company, is it not?

A. It is.

Q. There is coordinated service in all that territory?

A. That is correct.

Q. The greater portion of the mileage in Iowa, the main east and west line is also covered, is it not?

A. It is.

Q. In fact, it is all covered except that portion as shown by the map?

A. Yes.

524 Q. Has coordinated service with the Motor Transit Company been beneficial to the railroad?

A. It has.

Q. In what way?

A. It has been our experience that the facilities,—that it facilitates the movement of the traffic, speeds up the operation of the local trains handling carload traffic and releases for other purposes a considerable amount of equipment.

Q. Those are the advantages that accrue to the railroad; and I presume by that very token that also benefits the public, particularly in the nature of speeding up shipments and saving time in transit?

A. That is correct.

Q. Can you give me any examples of the way coordinated service has benefited the railroad in your territory?

A. Yes, I have particularly in mind the section in Illinois involving our line across Illinois from Chicago to the Tricities and in the Peoria district where coordinated service was responsible for releasing some 500 cars a month.

Q. When it is translated into car days and car miles, does it represent a considerably larger figure?

A. That represents quite a substantial figure.

Q. Of course, when you release those 500 cars, those cars are available for other service?

525 A. That is correct.

Q. And also relieves congestion, does it not?

A. Yes, that has been our experience, particularly in terminals.

Q. Does it speed up the remaining rail service, with a subsequent benefit to the shipping public and to the railroad?

A. That is correct.

Q. Now then, do you believe there will be a similar advantage to the railroad and to the shipping public by the acquisition of the lines under consideration here today?

A. My studies so indicate.

Q. You have made a study specifically related to the territory under acquisition?

A. I have made such a study.

Q. What have you to say as to the benefits to the railroad that will accrue from it, should it be approved?

A. Generally speaking, the benefits to be obtained will be a speed up in the L. C. L. service to the points affected by the application. It will mean the release of equipment and savings in car miles and car days, and be a savings in the

operation of the local freight in the territory between Des Moines and Council Bluffs, with a consequent faster movement over the line of the railroad, permitting them to more expeditiously handle the earload traffic as well as a savings in overtime expense so far as wages of crews are concerned.

526 Q. Does your study indicate just exactly in detail what those savings in cars, car miles, car days will be?

A. Yes, it does.

Q. Can you give that to us for the record.

A. It will be a savings in car miles per annum of 38,157 in this territory covered by the Frederickson application. There will be a savings of 1,248 car days per annum, and an approximation of \$5,000.00 in overtime expense.

Q. How about the savings in cars themselves per annum?

A. There will be a savings of 104 cars per month, or 1,248 cars per year.

Q. All of that will be achieved by having available co-ordinated service in this Frederickson territory?

A. That is correct.

Q. Will there be any saving in train miles?

A. No, there will be no savings in train miles.

Q. You will continue over exactly the same train operations as at the present time, but effect your savings through elimination of individual cars and L. C. L. merchandise movement?

A. That is right, a more expeditious movement of the trains involved by reason of relieving them of the handling of the L. C. L. traffic.

527 Q. How does an L. C. L. shipment move out of Omaha eastbound into this territory. Let us take a specific point and describe how a shipment would move. Refer to Exhibit C-1. There is the town of Weston. How far is that from Omaha?

A. That is approximately 15 miles from Omaha.

Q. 15 miles from Omaha?

A. Yes.

Q. How would an L. C. L. rail shipment move into Weston?

A. That shipment would be turned over to the Rock Island Motor Transit at Omaha and move by truck over Route 6 from Omaha to Atlantic, at which point it would be transferred to the rail service.

Q. Let us, as you go along, describe the days involved. The first day what would happen?

A. The first day that shipment would move from Omaha to Atlantic. The second day it would move from Atlantic to Avoca.

Q. That would be a rail movement?

A. That would be a rail movement. Then that car would be handled by the local freight runs that operate north and south out of Avoca over the Harlan-Carson branches. On the third day it would move from Avoca to Weston.

Q. So that, assuming it made connections at all these points, the best service you could give would be third day service into Weston?

A. That is correct.

528 Q. (By Exam. CLIFFORD) It is my understanding it would pass right through Weston to Atlantic?

A. No, the difficulty of the situation, Mr. Examiner, is it would go over Route 6; the application we have, if approved, would permit it to—

Q. The rail line passes right through Weston, does it not?

A. The rail line passes through Weston.

Q. I am speaking now of the peddler service on the rail line, the L. C. L. service. Forget for a moment the truck service, how would that point be served.

Mr. CASSELL: Mr. Examiner, that is the way it is done today.

Exam. CLIFFORD: I can not conceive of a thing like that. The town is only 15 miles from Omaha.

Mr. CASSELL: Yet it requires us to move it 125 or 130 miles.

Q. Is that because of the amount of traffic or the quantity of shipments is so small it would not warrant a train stop at Weston to release the shipments?

A. We have no local service, way freight or peddler service eastbound out of Omaha.

Q. It has to go east as far as Atlantic in order to catch a peddler to work back?

A. That is correct.

Q. That is the way it is being done today?

529 A. That is right.

Q. You do not get much traffic for Weston?

A. Weston is a small community.

Q. (By Mr. CASSELL) That was picked as an extreme example but the same effect would be true as to all the rest of the points in the territory, the merchandise has to go east and then be routed back?

A. That is correct.

Q. Whereas, if the acquisition were approved, instead of going by, it would stop off on the first trip, so there would not only be a conservation of rail equipment but actually a conservation of motor equipment too, would it not?

A. That is correct.

Q. How does L. C. L. merchandise westbound out of Chicago, which would be an interstate movement, move into this territory. How would it be worked into it today?

A. That would be loaded at Chicago today in the Des Moines car, be handled to Des Moines, reaching there at early afternoon of the following day, where it would be transferred into a car moving from Des Moines to Atlantic, move out that night, reaching Atlantic the following day, and that would then be peddled west from Atlantic as I have previously described.

Q. Then there would still yet be two days after reaching Atlantic until it would get to Weston?

A. That is right.

530 Q. Again assuming it made connections, the best possible connections?

A. Yes, under present conditions; that is assuming all of the freight terminals are able to clean up every day currently, which is not always the case with the amount of traffic that is being handled and the congestion that exists at some of the terminals. The question of manpower, crews to operate these trains also enters into the picture very decidedly.

Q. And also the matter of the O. D. T. restrictions?

A. Which provide maximum loads and complete utilization of equipment.

Q. That too may impede this schedule?

A. That is right.

Q. Now then, if the coordinated service was effected as you have already described, it will eliminate, of course, a third day delivery on eastbound movements and also backhauling by the railroad and eliminate mileage actually on the Motor Transit Company. How would you work a coordinated movement in westbound traffic if this application was approved?

A. The local traffic between the points of Des Moines to Omaha would be turned over to the Rock Island Motor Transit Company for local peddling between those points.

Q. It might move all the way out of Des Moines or  
531 break bulk at Atlantic, it would depend on the circumstances?

A. Yes, but I would think in the further interest of conserving equipment the proper thing to do is to give the traffic to the Rock Island Motor Transit Company at Des Moines to save re-handling and tying up further equipment in the moving from Des Moines to Atlantic.

Q. As a matter of where break bulk would occur would be a matter of operating convenience at the time, and probably change from time to time?

A. Yes, that would be true.

Q. Quite conceivably Avoca might be a breaking point?

A. That could happen.

Q. It would all depend on the conditions and the time and the traffic involved?

A. And the most economical practical way to handle the traffic.

Q. Regardless of what that might be on the westbound movement, it would save at least two days on any shipment, would it not?

A. Yes, it would.

Q. Assuming you got the most expeditious rail service?

A. Yes.

Q. And the saving might be even more?

A. That is right.

Q. The same is true on the eastbound movement?

A. That is right.

532 Q. Of course, as these are advantages to the railroad in being able to save car miles and car days and all other savings you have mentioned, speeding up their trains, relieving congestion, by the same token the benefits accrue to the shipping public, do they not?

A. Decidedly so.

Q. They are the ultimate recipients of the savings in time?

A. That is correct.

Q. Their service is improved by reason of these things?

A. Yes, sir.

Q. There is no intent on the part of the railroad to discontinue any of its present service in way of trains?

A. No, there is no intention of anything of that sort.

Q. That is the explanation for your statement that although there is such a large saving in cars, car miles, there is no saving to be contemplated in train miles?

A. There is no saving contemplated in train miles.

Q. Is there anything further, Mr. Limestall, you might say in showing how this service will be used?

A. I believe not.

Q. Or the benefits either to the public or to the railroad?

A. I believe that has been covered.

Mr. CASSELL: That is all.

### Cross Examination.

533 Q. (By Exam. CLIFFORD) Mr. Limestall, if the Commission should impose a restriction in its approval of this transaction, limiting the service to prior or subsequent rail movement, would that handicap the operation?

A. Yes, I would say it would because we are attempting in this application to provide a service to local points, the principal freight consigned to those points originating in Omaha.

Q. (By Mr. CASSELL) You have a relatively short haul involved, whether it is either west or eastbound?

A. That is correct.

Q. For so short a haul, a prior or subsequent limitation could make a very awkward movement?

A. That is correct.

Q. Almost impossible to use it, as a matter of fact?

A. It would not be a practical operation, no.

Q. (By Exam. CLIFFORD) Now, as I understand it, it is your purpose to provide an all-truck service over this particular route, unrelated to the rail service, is that correct?

A. That is it.

Q. And in addition, to coordinate this truck service with the existing rail schedules, is that correct?

A. That is correct.

Q. Atlantic westbound would be the break bulk point, I presume? Is that correct?

534 Q. A. I wouldn't say it would in all cases, because to realize the full benefit of this operation and eliminate the car days and car miles, I would say that making Atlantic a break bulk point, particularly on westbound traffic out of Des Moines, would tie up equipment unnecessarily when that same traffic could be given to the Rock Island Motor Transit at Des Moines, which point is one of the larger freight terminals of the Rock Island Railroad from four directions.

Q. If the L. C. L. traffic broke bulk at Des Moines and was given to the truck line, would that truck line carry it right into Omaha?

A. No, I have in mind, Mr. Examiner, the traffic which would peddle between the local points between Des Moines and Omaha.

Q. This territory is so close to Omaha, why don't you break bulk at Omaha, why would it not be more practical to break bulk at Omaha rather than Des Moines, and work back?

A. Because you already have your facilities set up for the transfer and handling of this traffic at Des Moines. By looking at the map you will see that your rail line operation covers, into Des Moines, covers quite a central location, with a Chicago-Denver line in an east and west direction and a Twin Cities-Kansas City line in a north and south direction. To break bulk on Omaha and move back, as an example, would require the Twin Cities, Minneapolis and

535 St. Paul, to load certain traffic on Omaha where you already have a set-up, and particularly now under the O. D. T. rules and regulations of maximum carloads, and that can be set up and move into Des Moines and have a break bulk point, which makes a more practical operation of it.

Q. My understanding is that even the traffic to Omaha, the break bulk point would be Des Moines.

A. Generally speaking, that would be true.

Q. You would not run a peddler car through to Omaha?

A. Not unless the traffic would justify a maximum load on that particular day.

Q. You say that the Rock Island Motor Transit presently maintains a terminal facility at Atlantic?

A. That is my understanding yes; a minor terminal, I would call it.

Q. Then it does not necessarily mean you propose to work this traffic out of Atlantic, is that correct?

A. I would say not.

Q. Presumably you would have a through truck that would operate from Des Moines into Omaha and peddle it back with smaller equipment, is that what you have in mind?

A. Well, that, of course, would be a question that the Rock Island Motor people may be a little more qualified to answer than I, but my thought would be that the traffic for these local territories would be given to the Rock Island

536 Motor Transit at Des Moines and at Omaha and from there they can peddle in the east and west direction in the movement of traffic by peddler trucks, whatever arrangement they may want to make.

Q. You have not given any study to that situation?

A. I have not studied their operation.

Q. You do not know whether it would be more practical to operate through to Des Moines and peddle back or whether they would stop at Atlantic?

A. No, I am not familiar enough with their operations to pass on that.

Exam. CLIFFORD: That is all.

Mr. CASSELL: That is all.

(Witness excused.)

LEO FARNER WAS SWORN and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. Leo Farner.

Q. Where do you live?

A. Harlan, Ia.

Q. You are of the Farner Department Stores?

A. Five to a dollar department stores.

Q. You are the owner of that concern?

A. Yes, sir.

Q. Is that a chain or one store?

A. We just have two stores.

537 Q. Both in Harlan?

A. And Dennison.

Q. Harlan and Dennison, Ia.

A. Yes, sir.

Q. Are you engaged in general merchandising?

A. Dry goods and a general line.

Q. Now, does that include hardware?

A. Most everything but groceries.

Q. Furniture?

A. No furniture. Just light furniture.

Q. You are familiar, are you not, with the present application that is before the Commission today?

A. I think so.

Q. The Rock Island Motor Transit Company is seeking to acquire the Frederickson operation?

A. Yes.

Q. Mr. Frederickson serves your community at the present time, does he not?

A. Yes.

Q. And the Rock Island railroad also serves your town?

A. They do.

Q. You know if the Commission approves this application, the Rock Island Motor Transit Company will be substituted for Mr. Frederickson in that operation?

A. Yes.

538 Q. That then they will be the motor carrier serving your town?

A. Yes.

Q. You also realize this is a proceeding before the Interstate Commerce Commission and it is interested primarily in an interstate movement of goods?

A. Yes, sir.

Q. Now then, I presume most of your traffic, being in the merchandising business, is inbound?

A. Yes.

Q. Probably the only shipments you make outbound are the return of damaged goods which would be a very minor movement?

A. That is about all.

Q. From what points interstate do you receive most of your merchandise?

A. St. Louis, Sioux City, Lincoln, Kansas City and Omaha.

Q. Do you know, as you may see from a glance at Exhibit C-9, the Rock Island Motor Transit Company at the present time serves Lincoln, Nebr. and it also serves Kansas City and Chicago, as well as Omaha, of course, and the Twin Cities? A number of those, you say, are your origin territories?

A. Yes.

Q. What type of merchandise do you receive from Lincoln?

A. Dry goods and notions.

Q. Moving in L. C. L. or L. T. L. lots?

A. Yes.

539 Q. What type of merchandise from Omaha?

A. Dishes, glassware, hardware, and some dry goods.

Q. That also would move in L. T. L. and L. C. L. lots?

A. Yes.

Q. Probably most all of the shipments come in less than carload lots?

A. All of them.

Q. Do you know of those shipments moving by truck at the present time, or do any come in by rail?

A. I would say that 75 per cent is probably by truck.

Q. And 25 per cent by rail?

A. That is right.

Q. Is the 25 per cent rail brought in by the Rock Island?

A. The Rock Island, Great Western and the Northwestern.

Q. Depending on the origin territory, as to who moves it?

A. Yes.

Q. You have heard the testimony of Mr. Limestall and Mr. Peterson, Mr. Limestall was a railroad witness and Mr. Peterson a motor transit witness, and Mr. Limestall showed there would be a saving of some three days in shipments via rail from Omaha, and probably over two days from westbound movements out of Chicago and such points to your place, would that be of any advantage to you?

A. Very much so; especially now.

Q. I imagine your inventories are low?

A. And the demand is great.

540 Q. So whenever you get an expeditious movement that is so much the better for you?

A. Yes.

Q. Even in normal times, is it not a fact it has been a merchandising practice in recent years to keep a smaller inventory than used to be followed in the old days?

A. That is right, with more turnover.

Q. With the modern trend in merchandising, time in transit has become more important.

A. Yes.

Q. You can not afford to wait a long period of time any more for merchandise to come in?

A. No.

Q. Now then, the ability to save that time would be of advantage to you?

A. Very important.

Q. If the Rock Island Motor Transit Company was able to effect coordinated service with the Rock Island Railroad, that would be of benefit to you?

A. Yes.

Q. Would you use that service?

A. We surely would.

Q. You would like to have it?

A. More reasons than one. One of the important things is our claims. We don't know who is bringing our merchandise in and they all pass the buck and we can not collect.

541 Q. That is especially true with motor carriers at the present time?

A. Yes.

Q. If you had a single-line from Lincoln, if this is approved, you could ship via Rock Island Motor Transit from Lincoln into Harlan and you would have only one carrier, would that be an advantage to you?

A. Very much so.

Q. Over a movement that would require no interlining?

A. Save time from Lincoln.

Q. Is it not true when you have interline shipments with two or more carriers, there is an opportunity, we will say, for damage to those shipments in handling?

A. Much more so, than if handled direct.

Q. You said you have experienced difficulty in tracing claims?

A. We just practically ignore claims. They pass the buck, they just hauled it from Omaha. We don't make any money on it. I forget about it and take my loss and that is all there is to it.

Q. You would be very materially interested in seeing the Rock Island Motor Transit Company having available service into your town as a truck line?

A. Yes, we would.

Q. You would also like the coordinated service with the Rock Island Railroad?

A. Yes.

542 Q. Do you think that would be a similar advantage to the other merchants in your community?

A. Especially where we are located in Harlan. We don't have very good connections.

Q. You are on the branch line of the Rock Island?

A. Yes.

Q. Explain about that.

A. You take Sioux City. Down it comes into Omaha and then up and may lay in Omaha a day if it don't happen to catch the right truck, and take about a week from Sioux City.

Q. You are at a transportation disadvantage at the present time?

A. Yes, very much so.

Q. Do you think the Rock Island Motor Transit Company as a truck line, and also the coordinated service, would overcome some of your difficulties?

A. It would.

Q. I take it you are appearing here in support of the application?

A. That is right.

Mr. CASSELL: That is all.  
 Exam. CLIFFORD: No questions.  
 (Witness excused.)

BRUCE POTTER was sworn and testified as follows:

Direct Examination.

543 (By Mr. CASSELL) You are Mr. Bruce Potter?

A. That is right.

Q. You are also of Harlan, Ia.

A. Yes.

Q. Like the witness immediately before you, Mr. Farner?

A. Yes, sir.

Q. You are with the Green Bay Lumber Company?

A. Yes, sir.

Q. You are the manager of that company?

A. The manager at Harlan.

Q. Does that company also have other branches?

A. Has about forty-eight or nine in Western Iowa.

Q. It is a relatively large concern then?

A. Yes, sir.

Q. Does it have any other branches in the territory under consideration, being this application today? You know what that territory is.

A. Well, they have branches in—

Q. Exhibit 2 shows the towns involved right here. (Indicating.)

A. In Minden and Marne and Walnut, and of course, in Atlantic too where the terminal originates.

Q. And in Harlan?

A. Yes.

Q. Do you have any other branches under your jurisdiction, or is your jurisdiction just limited to Harlan?

544 A. Just limited to Harlan.

Q. I suppose you are familiar somewhat with the difficulties and problems of the other points?

A. That is right.

Q. What types of commodities does your concern deal in?

A. Lumber, coal, millwork, hardware, paint and all types of building materials.

Q. Now then, you realize that this is an application before the Interstate Commerce Commission primarily interested in interstate shipments from points outside the

state of Iowa. From what points outside the state of Iowa do you receive these commodities?

A. We receive them from Omaha, from Rock Island, Illinois, and Kansas City.

Q. I suppose you get some from Chicago too?

A. Not very much.

Q. What type of shipments are made in L. C. L. lots?

A. Paint, millwork and hardware.

Q. Where does your paint come from?

A. Kansas City.

Q. And the hardware?

A. Comes from Omaha and Des Moines.

Q. Probably at the present time your shipments move both by rail and by truck.

A. Yes, sir.

545 Q. The Rock Island Railroad serves your town, and you know, of course, Frederickson serves your town at the present time?

A. Yes.

Q. If this application is approved, the Motor Transit Company will be substituted for Frederickson in serving your point?

A. Yes.

Q. Are you experiencing difficulty like those problems related by Mr. Farner at the present time in Harlan in your shipments?

A. Yes.

Q. You find you do not have available to you single-line motor carrier service from your points of origin?

A. Yes.

Q. Consequently, do you have difficulty tracing your shipments and getting them on time?

A. That is correct.

Q. Do you think it would be an advantage to you if the Rock Island Motor Transit Company were able to serve your town and give single-line motor carrier service to Rock Island, Chicago, the Twin Cities and all the various other large distribution points served by them?

A. It would be an advantage to us from Rock Island, Ill., I know.

Q. Have you had some trouble in the delivery of shipments from Rock Island?

546 A. We ship millwork from the Rock Island Sash & Door Company at Rock Island. It is handled by truck. We request it that way, and it is hauled, used to

be hauled to Omaha, transferred to Fredericksons and backhauled to Harlan. Now it is hauled to Atlantic, unloaded and re-loaded to the Frederickson truck and hauled to Harlan.

Q. Does that double handling create a disadvantage to you?

A. Well, in the shipping of millwork, the handling is the thing that usually wrecks most of it.

Q. You would be interested in single-line then in order to avoid damage to millwork?

A. That is right.

Q. Millwork is particularly vulnerable to damage in handling?

A. Yes, sir.

Q. You would like to see a single-line motor carrier into your town?

A. For my own personal reasons.

Q. Did you hear the testimony of Mr. Limestall as to relative shipments, that you would be able to save two days at the least and possibly more, would that be any advantage to you?

A. Yes.

Q. I suppose you would like to see some improvement in the rail service, would you not?

A. That is right.

547 Q. If this service were available, would you use it?

A. Yes, sir.

Q. I take it then you are appearing here in support of this application, and would like to see it granted?

A. Yes, sir.

Q. Is there anything more you would like to add, which occurs to you, about this application and why you are here supporting it?

A. Well, my personal reason is we buy all our millwork from the Rock Island Sash & Door Company, which amounts to a considerable tonnage in a year.

Q. You would like to see the single-line motor carrier service?

A. It would be a great advantage to have it handled once. It is better than rail service because your cars are loaded at Rock Island, shipped to Des Moines, re-loaded, shipped to Atlantic, re-loaded again and shipped local to Avoca, and is possibly re-loaded there if there is not weight enough and sent up on the branch line.

Q. You would be better satisfied if this could be handled once?

A. It would be a great advantage.

Q. (By Exam. CLIFFORD) How do you figure it could be handled once?

A. Usually that stuff is shipped by truck, enough tonnage.

Q. Shipped in truckload lots?

548 A. That is the way we request it.

Q. Is it your understanding that if this transaction is approved, that the Rock Island Motor Transit Company will load a truck at Davenport or Rock Island and haul it direct into Harlan?

A. I would presume so; there is usually tonnage enough.

Q. There has not been any testimony to that effect today.

A. I would just presume that there would be tonnage enough to warrant them coming from Atlantic up to Harlan.

Q. Do you think the tonnage would be turned over to the Rock Island?

A. It is requested to come that way now as far as Atlantic, at my request.

Q. By the Rock Island Motor Transit Company?

Mr. CASSELL: That would be merely continuing a few miles farther.

A. That is all.

Q. They would not give you assurance they would institute direct service from Rock Island to Harlan?

A. I presume from their standpoint,—it is usually two or three tons,—it would be easier for them to bring it on up?

Q. Do you get any of this traffic at all by rail?

A. The last three or four years we have requested it be shipped by truck because we had so much damage by handling. We got one service from Rock Island, Ill. to Atlantic.

549 Q. At the time you were asked to appear here, did they give you any indication they would provide a through service?

A. No.

Q. From Rock Island into Harlan?

A. No, but I presumed that that was why they called on me because we were a shipper by truck to Atlantic.

Q. (By Mr. CASSELL) Mr. Peterson is here and he can clear that up. Mr. Peterson, as a matter of fact, you have a through truck from the Tri or Quad-City area, Rock Island, every night at the present time, do you not?

A. Yes, we have. We have a through schedule from Rock Island to Omaha every night, one to three trucks a night, and never less than one which goes directly through. If there was tonnage of any consequence, it would be very little out of the way to route it by Harlan.

Q. You could afford through service?

A. Yes.

Q. (By Exam. CLIFFORD) Mr. Peterson, Harlan is a branch line. The truck would have to go direct to Harlan or the lading transferred at Avoca, isn't that right?

A. That would depend on the amount of tonnage involved.

Q. You heard this witness testify. He said the movement out of Rock Island into Harlan is largely in truckload lots.

A. That would move directly through to Harlan.

Q. And it is being handled at the present time by 550 Rock Island Motor Transit Company with interchange at Atlantic.

A. Either Atlantic or Omaha, preferably Atlantic at the present time.

Q. I mean so far as his particular situation is concerned, if he had a truckload movement of this millwork, as he claims, originating at Rock Island or at an eastern point there, and destined to Harlan, you would move it direct without transferring it, is that correct?

A. That is correct.

Exam. CLIFFORD: Thank you, Mr. Peterson.

Q. (By Exam. CLIFFORD) Referring again to Mr. Potter, you feel that would very materially improve the service?

A. Saves the one handling we have now, one transfer, and with millwork the more times it is handled the worse it gets.

Q. Don't you have any other available service of that character?

A. The railroad, which handles it three or four times now.

Q. No carrier service which provides direct service from Rock Island into Harlan?

A. No, sir.

Q. You feel that this transaction would be a decided advantage to your firm?

A. That is right.

Exam. CLIFFORD: That is all.

Mr. CASSELL: Nothing further.

(Witness excused.)

551 R. T. GOULD was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) Your name is R. T. Gould?

A. Yes, sir.

Q. You are also of Harlan, Ia.

A. That is right.

Q. You are with the Harlan Produce Company as traffic manager?

A. Yes, sir.

Q. What type of business is the Harlan Produce Company engaged in?

A. Wholesale poultry, eggs, butter and ice cream.

Q. Your concern is located solely at Harlan?

A. That is right.

Q. As traffic manager, you are required to be familiar with the transportation requirements of your concern?

A. Yes, sir.

Q. As a produce company, I presume most of your shipments, interstate shipments, are outbound, aren't they?

A. Most of them outbound are in carload lots.

Q. And you receive shipments inbound in L. C. L.

A. That is right.

Q. From what points do you receive interstate shipments inbound L. C. L.?

A. From Chicago, Kansas City, Omaha, Minneapolis.

Q. What types of commodities do you receive from Omaha?

552 A. Packages of all kinds and parts, and ingredients for our ice cream, and so on.

Q. How about Chicago?

A. About the same.

Q. The Twin Cities?

A. Packages mostly.

Q. I presume you experience somewhat the same shipping difficulties as the other two witnesses who have just been on, Mr. Potter and Mr. Farner?

A. Yes, we do.

Q. You are also familiar with the proposed service here to be afforded by the Rock Island Motor Transit Company?

A. Yes.

Q. As can be seen from Exhibit C-9 and from the testimony of Mr. Peterson, you will be able to have single-line motor carrier service to Chicago, Omaha, the Twin Cities—Minneapolis and St. Paul, would that be of benefit to you?

A. Certainly would.

Q. Can you describe a little more of what benefit that would be to you?

A. Well, I have the same difficulty with packages Mr. Potter has with his millwork. They come in bundles and the more times they are handled the more times they become separated and more or less damaged enroute.

Q. You would like to see a single-line carrier in there?

553 A. Yes.

Q. Do you receive any shipments by rail at the present time?

A. Yes.

Q. Would a saving of time in transit of approximately two days as testified to by Mr. Limestall, be of benefit to you and your firm?

A. Certainly would.

Q. Time in transit is of benefit to your concern?

A. Oh, yes.

Q. If you could lop off two days?

A. Quite often it would mean the difference of being able to package our product and not being able to, in receiving a shipment of package boxes.

Q. Your products, or some of them, are more or less perishable?

A. Very much so.

Q. If you can save two days in getting your products toward destination, that would be a very material benefit to you?

A. That is right.

Q. I take it you would like to see this service instituted?

A. I certainly would.

Q. Both the straight truck service and the coordinated service?

A. Yes, both would be a benefit to us.

Q. You would use them if they were available?

554 A. Yes.

Q. You are appearing here in support of the application?

A. Yes.

Q. Is there anything further you would like to say?

A. I don't believe so.

Mr. CASSELL: That is all.

Exam. CLIFFORD: No questions.

(Witness excused.)

H. SEIFERT was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. H. Seifert.

Q. You live at Avoca, Iowa?

A. Yes, sir.

Q. You are the owner of the Seifert Lumber Company?

A. Yes, sir.

Q. I presume, as a lumber company you deal in a general line of building materials, paints, glass, and so on?

A. Yes.

Q. Hardware?

A. Yes.

Q. Building hardware?

A. Yes.

Q. I suppose you receive a large number of shipments

L. C. L. do you not?

555 A. Yes.

Q. Less than carload and less than truckload quantities, do you not?

A. Some, yes.

Q. That would be hardware and paint particularly?

A. Yes.

Q. Your lumber, of course, would come in carloads?

A. Yes.

Q. Are you familiar with the application that is before us today, the acquisition of the Frederickson rights by the Rock Island Motor Transit Company?

A. I have been the last few days.

Q. You have been advised as to the nature of that?

A. Yes.

Q. The town of Avoca at the present time is served by Frederickson. You realize if this is approved, the Rock Island Motor Transit Company would be substituted for Mr. Frederickson and his son?

A. Yes, sir.

Q. Your town is also served by the Rock Island Railroad, that is the only railroad in your town?

A. Yes.

Q. From what points do you receive these L. C. L. shipments outside of the state?

556 A. Well, outside of the state we haven't any. Most of our L. C. L. comes from Muscatine, the millwork.

Q. Do you receive some of them though from Omaha?

A. Yes, some.

Q. Some from Chicago?

A. No, just from Omaha.

Q. Muscatine, as you can see on Exhibit 1, which is this road map, Muscatine, Iowa is served,—there is a blue line running through Muscatine, and that blue line represents the present operation of the Rock Island Motor Transit Company, which runs all the way from Muscatine up to Atlantic?

A. Yes.

Q. If this operation were approved, you would have single-line service from Muscatine on into Avoca?

A. Yes.

Q. I realize that is intrastate shipment, but I presume you would be interested in that, would you not?

A. Yes.

Q. Likewise, you would be afforded the service of the Rock Island Motor Transit Company interstate from Omaha?

A. Yes.

Q. Now then, do you receive any shipments by railroad yourself?

A. Railroad, yes.

Q. If you were able to save two days time or more, depending upon the happenstances of the particular shipment, in your shipments by rail, would that be any benefit to you?

A. Yes, it would. As I understand it, our L. C. L. shipments all come by railroad to Des Moines now and then to Avoca.

Q. They are peddled out of Des Moines?

A. No, they come by railway.

Q. To Des Moines, and go from Des Moines to Atlantic, and from Atlantic they are handled again?

A. No, as I understand it, our L. C. L. shipments all come by railroad direct to Avoca from Muscatine.

Q. If your rail shipments saved two days time in transit would that be an advantage to you?

A. Yes, it would.

Q. You would like to see that service instituted?

A. Yes.

Q. Then I take it you are appearing here in support of this application and would like to see it granted. You would like to see the Rock Island Motor Transit Company give that service?

A. Yes.

Mr. CASSELL: I think that is all.

Exam. CLIFFORD: We will adjourn for lunch until 2:00 o'clock.

(Recess was taken at 12:15 until 2:00 P. M.)

558 J. P. MONTGOMERY was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. J. P. Montgomery.

Q. Where do you live?

A. Shelby, Ia.

Q. You are an owner of a drug store in that town?

A. That is right.

Q. As a drug store proprietor, I presume that you have most of your shipments inbound from outside Shelby, inbound to your store. You have practically no outbound shipments excepting probably damaged merchandise?

A. That is right.

Q. From the nature of your business, most of your shipments would be L. C. L., I suppose?

A. That is true.

Q. If not all of them?

A. Yes.

Q. You probably ship some by rail and some by truck?

A. That is right.

Q. At the present time in your community, you have the service of Frederickson & Son as a motor carrier, do you not?

A. That is true.

Q. And the service of the Rock Island Railroad as a railroad. Is there any other railroad in your town?

559 A. No.

Q. That is the only railroad?

A. That is right.

Q. You understand the purpose of this hearing today is to permit the Rock Island Motor Transit Company to acquire the operating authority of the Fredericksons?

A. That is right.

Q. If the acquisition is approved, the Rock Island Motor Transit Company will be substituted in the motor carrier operation for the Fredericksons?

A. That is right.

Q. Before you are two maps, marked Exhibits C-9 and 1, the highway map is Exhibit 1, and shown in yellow there is

the Frederickson operation, and in blue the present operation of the Motor Transit Company, and similar information is shown for the entire operation on Exhibit C-9, the other map?

A. Yes.

Q. From what points outside the State of Iowa do you receive merchandise?

A. Chicago, Ill., St. Louis, Kansas City, Omaha and Sioux City.

Q. Sioux City, Ia.?

A. Yes.

Q. The Rock Island Motor Transit Company, as  
560 you can see from Exhibit C-9, has motor carrier rights at the present time into Kansas City and Chicago; it does not operate into St. Louis although the Rock Island Railroad does. The testimony here this morning brought out that the Rock Island Motor Transit Company in conjunction with the Rock Island Railroad could give coordinated service on shipments westbound, moving over the Rock Island Railroad today, where there would be a saving of time of at least two days, would that be of any benefit to you?

A. Yes, it would.

Q. Do you receive shipments by rail out of Chicago at the present time?

A. Why, no.

Q. Is that partly due to transportation difficulties?

A. It is because the service is not as rapid as through other points.

Q. You would like to have the ability to make purchases in Chicago if the transportation time in transit was shorter, would you not?

A. That is true.

Q. Would the saving of two days, at least two days time in transit, permit you to widen your marketing possibilities so that you could go into Chicago?

A. That is true.

561 Q. Would that be of benefit to you?

A. It would.

Q. Would also having a single-line motor carrier to these other points be of benefit to you?

A. Yes, it would.

Q. Do you have any single-line motor carrier service at all at the present time, one motor carrier that can go from either Chicago, we will say, or Kansas City to Shelby at the present time?

A. No, there are none.

Q. Have to interchange?

A. That is right.

Q. Would it be of any benefit to you to have that kind of service, a carrier that could perform that through service all the way?

A. Well, presumably, it would be shorter and I imagine less time involved with the shipment.

Q. Do you have any difficulty where there is a multiple carrier service in loss and damage to your shipments?

A. We have had recently, yes.

Q. Do you believe there would be any advantage in having a single-line carrier who would take the shipment all the way?

A. Yes, I do.

Q. Then do you believe it would be a benefit to your community and to yourself in particular in your business if the Commission were to permit the Rock Island  
562 Motor Transit Company to acquire the Frederickson  
operation here?

A. Yes, I do that.

Q. If it were permitted and approved and the operation actually instituted, would you use that service?

A. Yes, I would.

Q. I assume from what you have said, you are appearing here in support of that application and would like to see it granted?

A. That is right.

Mr. CASSELL: Any further questions from the Commissioner?

Exam. CLIFFORD: No questions.

Mr. CASSELL: That is all. Thank you very much.

(Witness excused.)

JOHN C. MILNE was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. John C. Milne.

Q. Where do you live?

A. My residence is in Council Bluffs, Ia.

Q. You are associated with the Skinner Manufacturing Company in what capacity?

A. Traffic manager and plant superintendent.

Q. What products does the Skinner Manufacturing Company produce?

563 A. Macaroni and spaghetti and we distribute cereal food products.

Q. You act as a distributor as well as an original manufacturer?

A. Yes.

Q. You distribute your own products as well?

A. Yes.

Q. What is your trade territory? What do you consider your trade territory?

A. The entire United States.

Q. Which would, of course, include the western part of Iowa?

A. Yes.

Q. Where the Frederickson operation is?

A. Yes.

Q. I presume, as traffic manager of your company, you are required to be more or less familiar with the transportation facilities available to you to ship out of Omaha, are you not?

A. That is true.

Q. Are you familiar generally with the rail service of the Rock Island Railroad?

A. Yes.

Q. The Rock Island Motor Transit Company at the present time operates in and out of Omaha, does it not?

A. Yes.

Q. I presume you also know the Fredericksons and their operations?

A. Yes.

Q. Which is shown on the map before you, Exhibit 1?

564 A. Yes.

Q. All of your shipments into this territory, I presume, would move out of your plant in Omaha?

A. Yes.

Q. Would move out of Omaha, Nebr., eastbound into this territory. You would not be shipping out products from any other point of origin?

A. No, sir; just from Omaha.

Q. Do you have shipments moving out with a fair degree of regularity into this territory where the Fredericksons operate?

A. Yes.

Q. How often do you make shipments into the territory?

A. I would say once a month to the smaller towns and two or three times a month to Harlan.

Q. By the time you add your shipments up, you would have quite a few shipments monthly into the territory?

A. Yes.

Q. Those would be to grocers, I presume?

A. Yes, wholesale houses or grocery stores.

Q. Practically all of that would move in L. C. L. lots?

A. That is true.

Q. This morning Mr. Limestall, the Superintendent of the Rock Island, showed there could be a saving of at least three days of time in transit over the present rail  
565 service by using the coordinated service with the Rock Island Motor Transit Company to these points, would that be of any benefit to your company, to save three days?

A. Yes, it certainly would. The merchandise, of course, can't be sold until it gets on the grocer's shelves.

Q. Especially today with the limited inventories, the matter of saving time is of very much help and importance to your company?

A. Yes.

Q. Of course, Mr. Peterson, the General Manager of the Rock Island Motor Transit Company, testified there would be daily service and first morning delivery by the Motor Transit Company itself?

A. Yes.

Q. Which would be in effect continuing the present service of the Fredericksons?

A. Yes.

Q. That service would be available to you, too?

A. Yes.

Q. Do you believe that such an operation as has been described would be of benefit to you and to the shipping public?

A. I am quite sure it would be beneficial to us. Instead of using Rock Island Transit to, we will say, Atlantic, Ia., as we do at present, and Fredericksons to Avoca or Marne,  
566 Ia., it all could move Rock Island and save billing and handling expense.

Q. Double handling?

A. Yes, and expediting the return of our freight bills, which is very important in our bookkeeping set-up. We insist they be back within 48 hours.

Q. Have you found the service such as the Rock Island Motor Transit Company is able to render at the present time satisfactory as far as it goes?

A. Yes, they do very well.

Q. You would like to see them have this additional authority?

A. Yes, I would.

Q. You think it would be beneficial to yourself and to other shippers?

A. Yes.

Q. You would patronize the Rock Island Motor Transit Company if it did have the authority?

A. Yes.

Q. I take it you are appearing here in support of the application, and would like to see the Commission grant it?

A. Yes, I would.

Q. Is there anything more you would like to add, your particular shipping problems you would like to go into?

A. No, I think that covers it very well.

Exam. CLIFFORD: No questions.

Mr. CASSELL: That is all. Thank you very much.

(Witness excused.)

567 R. B. WIXSON was sworn and testified as follows.

# Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. R. B. Wixson.

Q. Where do you live?

A. Omaha.

Q. With whom are you associated?

A. Carpenter Paper Company.

Q. As traffic manager?

A. Yes, sir.

Q. What type of business is the Carpenter Paper Company in?

A. Wholesale paper and allied products, paper and paper articles.

Q. I presume, as a wholesaler then you probably receive shipments inbound in carload lots and distribute them among your trade territory in L. C. L. lots?

A. Yes, that is true.

Q. What do you consider your trade territory?

A. Well, we operate in all directions from Omaha, and more than half way to Des Moines. We have a Des Moines house which operate out of there, but we work part of Iowa, the western part of Iowa.

Q. Are you familiar with the territory served by Mr. Frederickson and his son at the present time?

A. By towns, I know the towns.

Q. The towns are listed in Exhibit 2?

568 A. Yes.

Q. Any in yellow on the map in front of you, Exhibit 1, is shown the routes he has, that is a part of your trade territory, is it not?

A. Yes.

Q. I presume you have shipments from time to time in every one of those towns, don't you?

A. I think we do all of them.

Q. With what frequency do you presume you would be making shipments into that territory?

A. Probably to some of the points every day.

Q. About what do those shipments average, how many pounds?

A. That is difficult to say. We might have a minimum shipment or it might be 2,000 pounds of merchandise, depending on the dealer to whom we were shipping.

Q. But you would have a fair degree of tonnage constantly moving out into that territory?

A. Yes, we have a continual movement.

Q. I do not believe you were here this morning to hear the testimony of Mr. Limestall, the Superintendent of the Rock Island, but he showed that with the coordinated service, through combining the rail and truck service, you could save about three days time in transit out of Omaha into this territory, if you shipped by rail, would that be of any particular advantage to you?

569 A. You mean the truck service would save—

Q. Save three days over what the railroad takes to deliver.

A. Yes, it certainly would. However, the greater portion of our stuff is moved by truck.

Q. Do you ship any by rail?

A. Some, not very much.

Q. I presume the reason you do not is because it is so slow?

A. That is it; it is the service.

Q. If it were speeded up, it would be more attractive?

A. Yes.

Q. Mr. Peterson, the General Manager of the Rock Island Motor Transit Company, testified there would be daily service out of Omaha into that territory, would that be beneficial to you?

A. Very vital; yes, sir.

Q. Have you been using the Rock Island Motor Transit Company at the present time on some of your shipments?

A. The Rock Island Motor Transit Company?

Q. Yes.

A. Yes.

Q. Have you found them satisfactory?

A. Very satisfactory.

Q. Would you like to see them render this additional service to you?

A. That would be very acceptable

570 Q. Would you use it if it were available?

A. We would wherever we have the routing of the shipments?

Q. You said you ship out of Des Moines. Now, of course, Des Moines into this territory would be intra-state, but in any event probably most of it is served out of Omaha?

A. Yes, all this territory would be from Omaha.

Q. Then I take it, you are appearing here in support of this application and would like to see it granted by the Commission?

A. Yes, I would.

Q. Any other particular problem you have that you believe this will help you on?

A. Nothing other than we are anxious at all times to see reliable carriers and know the shipments will move, because it is rather disastrous for us if a merchant does not get his shipment promptly.

Q. You think the Rock Island Motor Transit Company is that kind of a carrier that will give you reliable service.

A. Our experience has been such up to date.

Mr. CASSELL: That is all.

#### Cross Examination.

Q. (By EXAM. CLIFFORD): I might ask you a question or two. You say the preponderance of your traffic moves by truck out of Omaha into this territory?

A. Yes, sir.

571 Q. How many lines do you have available other than the Rock Island Motor Transit Company?

7 A. I can't tell offhand. I think there are three or four smaller lines.

Q. Have they been satisfactory?

A. So far as I know we have had no complaint.

Q. Well now, if this transaction is approved, do you in-

tend to divert the tonnage to the Rock Island rather than to continue with the carriers you now use?

A. On such shipments as we have the routing.

Q. That is what I mean.

A. Yes.

Q. In other words, if this transaction were approved, these other carriers you now deal with would lose that traffic, that is your plan, is that correct?

A. Well, that is rather—I would not want to make that statement without a little examination, but my thought is that we always want to patronize a reliable carrier, and if there are some carriers we find are slipping and are not making daily delivery, we would divert immediately.

Q. You do not have that difficulty now? They have been performing satisfactorily.

A. So far as I know, we have had no difficulty.

Q. You don't contemplate the day the Commission approves this transaction of turning your traffic over  
572 completely to the Rock Island?

A. Not unless there is some good reason for it, for changing. The number of shipments we route are not so large because ordinarily the shipper, rather our customer, route his own shipments.

Q. But there is a considerable number of shipments your concern governs the routing on?

A. Some that come in unrouted; yes, sir.

Exam. CLIFFORD: That is all.

Mr. CASSELL: Thank you very much, Mr. Wixson.

(Witness Excused)

(Recess was taken at 2:35 until 2:40 P. M.).

LESTER J. ZENKE was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CASSELL) What is your name?

A. Lester J. Zenke.

Q. By whom are you employed?

A. Employed by the trustees of the Chicago, Rock Island and Pacific Railway Company in the general accounting office.

Q. What are your duties in that general accounting office?

A. My duties are keeping the books, the general books of the Motor Transit Company.

Q. The Rock Island Motor Transit Company?

A. The Rock Island Motor Transit Company and also the Rock Island Railroad.

573 Q. You have among your duties a particular jurisdiction over the books of the Rock Island Motor Transit Company?

A. That is correct.

Q. As such you have access to all of them and they are under your care and supervision?

A. That is correct.

Q. Also you have access to the books and records of the Rock Island Railroad?

A. That is correct.

Q. I believe you were responsible, were you not, for the preparation of the financial exhibits attached to the original application in this matter?

A. That is correct.

Q. Was a communication, to your knowledge, received by the Rock Island Motor Transit Company from the Director of the Bureau of Motor Carriers, requesting certain information be produced at this hearing?

A. Yes, there was.

Q. Have you prepared a number of exhibits in response to that request?

A. I have prepared the exhibits in line with that request.

Q. Do you have those exhibits with you?

A. Yes, I do have.

(Marked for identification "Applicant's Exhibit Nos. 3 to 7, inclusive, Witness Zenke".)

574 Q. Those are exhibits which have been marked for identification as Exhibits 3 to 7, inclusive?

A. That is correct.

Q. Would you go through these exhibits, exhibit by exhibit, and also tie them in by reference to the communication of November 6th from Director Blanning?

A. Yes, I will. Exhibit No. 3 is the general balance sheet statement as called for in the letter of November 6th from Mr. W. Y. Blanning, for the Chicago, Rock Island and Pacific Railway Company.

Q. The general balance sheet consisting of how many pages?

A. Of two pages, the assets on sheet 1, and the liabilities on sheet 2, and that covers the period, or substituted, as of December 31, 1941, December 31, 1942, and as of September 30, 1943. Sheet No. 3 and No. 4 is the income

account statement for the Chicago, Rock Island and Pacific Railway Company for the year ended December 31, 1941, and 1942, and the nine months ended September 30, 1943. No. 5 is the the profit and loss account for the Chicago, Rock Island and Pacific Railway Company as of December 31, 1941, and 1942, and as of September 30, 1943.

This Exhibit 3 is compiled as requested in the letter of November 6th.

Exam. CLIFFORD: The income statement does not show any provision for income taxes, as requested in the 575 letter of November 6th, for the railroad, I mean.

A. Yes, on sheet No. 4, the supplemental statement on specified income items reflects that information.

Exam. CLIFFORD: Oh, yes; I see. That is all right.

A. The Exhibit No. 4 likewise has been prepared as requested by the letter of November 6th, and this comprises the exhibits for the Rock Island Motor Transit Company, this balance sheet statement as of December 31, 1941, 1942, and as of September 30, 1943. That is sheet No. 1. Sheet No. 2 is the Rock Island Motor Transit Company's income account statement for the year ended December 31, 1941, and for the year ended December 31, 1942, and for the nine months ended September 30, 1943, and likewise here the provision for income taxes is outlined in account No. 8000. Sheet No. 3 is the Rock Island Motor Transit Company's profit and loss statement as of December 31, 1941, 1942, and as of September 30, 1943.

Exhibit No. 5 is the balance sheet statement for J. H. Frederickson & Son as of December 31, 1941, 1942, and as of October 31, 1943.

Exhibit No. 6 is the income account statement for J. H. Frederickson & Son for the years ended December 31, 1941, 1942, and the ten months ended October 31, 1943.

Exhibit No. 7 is the profit and loss account for J. H. Frederickson & Son as of December 31, 1941, 1943, 576 and as of October 31, 1943.

Q. (By Exam. CLIFFORD) Now then in connection with the Frederickson statements, did he segregate his operations, that is the general commodity from the special commodity operations?

A. I am not aware of that.

Q. What I had in mind, the Rock Island is purchasing only these general commodity rights, and I understand he is a household operator too. When you made an audit of these books or compiled these statements from his records,

do you recall whether or not it was all of the revenue and expenses, whether it was all co-mingled, or did he keep separate books as to this general commodity operations and warehouse operations?

Q. (By Mr. CASSELL) Are you advised as to whether or not that segregation was made?

A. The figures as indicated on Exhibit 6 comprise the income and expenses derived from the common carrier or general commodity operation.

Q. The general commodity operation only, and not from the specialized commodity operation, furniture and livestock?

A. That is right.

Q. Just to key these definitely, I believe the letter has numbered paragraphs, will you tell which exhibits are in response at which paragraphs so you are sure you  
577 have answered each one?

A. Exhibit No. 3 is C. R. I & P. Railroad Company, paragraphs 1 and 2. Exhibit 4 is for paragraphs, for the Rock Island Motor Transit Company, paragraphs 2 and 3, and Exhibits 5, 6 and 7 are for J. H. Frederickson, and D. H. Frederickson, paragraphs 1, 2 and 3.

Q. Does that satisfy all requests made in this regard?

A. That is correct.

Q. All of these exhibits, including those for the Fredericksons, were prepared under your jurisdiction and supervision?

A. That is correct.

Q. They are true and correct to your best information and belief?

A. They are.

Q. Mr. Frederickson made available his books and records to you for this purpose?

A. That is correct.

Mr. CASSELL: I tender Exhibits 3 to 7, inclusive, and at the same time I might as well tender Exhibits 1 and 2.

Exam. CLIFFORD: They will be received in evidence. (Applicant's identification Exhibits No. 1 and No. 2, Witness Peterson, received in evidence.)

(Applicant's identification Exhibits Nos. 3 to 7, inclusive, Witness Zenke, received in evidence.)

Exam. CLIFFORD: I have no cross examination.

(Witness excused)

578 Mr. CASSELL: That is all, Mr. Examiner, the applicant, Rock Island Motor Transit Company has in support of its case. Mr. Frederickson is here, and I believe his attorney would like to put him on for questioning.

J. H. FREDERICKSON was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Higgins) Your name is J. H. Frederickson?

A. Yes, sir.

Q. And you live at Harlan?

A. Yes, sir.

Q. Mr. Frederickson, you are a member of the partnership of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son, is that correct?

A. Yes, the senior partner.

Q. Your principal place of business and your main office is located at Harlan, Ia.

A. Yes, sir.

Q. At the present time you hold certain operating rights from the Interstate Commerce Commission which they have designated as Docket No. MC 530 and Docket MC 530 Sub 1.

A. Yes.

Q. In the past you have been operating under the authority?

A. Yes, sir.

Q. You are familiar with the matters involved in the application being heard today?

579 A. Yes, sir.

Q. In regard to the transfer of the operating rights of J. H. Frederickson & Son to the Rock Island Motor Transit Company?

A. I am.

Q. You are the senior member of this partnership?

A. I am.

Q. Who has been the acting member and manager of this partnership?

A. I have.

Q. You are the gentleman who entered into a contract with the Rock Island Motor Transit Company on behalf of the partnership in regard to the transfer of certain equipment and your operating rights under MC 530 and MC 530 Sub 1, is that correct?

A. Yes, sir.

Q. And that is designated as Exhibit C-1 of the application made to the Interstate Commerce Commission?

A. Yes, sir.

Q. This contract was entered into by you voluntarily?

A. Yes, sir.

Q. And it is your wish that the Commission approve this contract and grant the application of the Rock Island Motor Transit Company in transferring your operating rights on general commodities to the Rock Island Motor Transit Company?

A. Yes, sir.

580 Q. I understand from your application you retain certain operating rights. I wish you would state to the Examiner what rights you are retaining.

A. The rights to operate and transport household goods in the states we have operating rights in. There are approximately seven, and we also have operating rights for livestock.

Q. Mr. Frederickson, you plan to continue the rights you are retaining?

A. Yes, sir.

Q. And you are requesting that the Commission approve the contract you have entered into to transfer the rights for the transportation of general commodities to the Rock Island Motor Transit Company?

A. Yes, sir.

Q. And you are appearing here today and state that you are in favor of this transfer?

A. Yes, sir.

Mr. CASSELL: That is all.

#### Cross Examination.

Q. (By Exam. CLIFFORD) Mr. Frederickson, may I inquire as to your reason for wanting to dispose of these particular rights?

A. Well, your Honor, we have got various other enterprises. We operate a wholesale tobacco business, beverages, etc., and the labor question is rather difficult and has been for some time. It is becoming too burdensome  
581 for one man to take care of all the details.

Q. You have your son with you, do you not?

A. He is engaged in a business of his own. He operates a service station and storage, etc.

Q. Then my understanding is he does not spend much of his time in the transportation business?

A. Not any.

Q. In other words, you manage the whole business, is that correct?

A. That is correct. I spent a couple of months in the hospital this summer, and on the advice of my physician, who advised me to dispose of some of the business I had, why I am now really anxious to get out from under the burdens of some of them.

Q. How did you arrive at the purchase price, Mr. Fredrickson? Is that the price you asked for the properties, or was that arrived at through arm's length bargaining?

A. Yes, there was considerable and lengthy discussion and bargaining relative to the value of the concessions and also the equipment. We have had considerable experience, rather I have, in purchasing new equipment and trading in the old equipment as part of the purchase price for the new, and based on the experience that I have had in regard to that, I arrived at what I thought was a fair value of the equipment that they secured.

582 Q. Have your general commodity operations been conducted at a profit?

A. Yes.

Q. I think your statement shows they have been.

A. Oh, yes; they have. In the past we only had 1933, 1934, and 1935 we did not have any profit, but after the years 1936 we have operated at a profit.

Q. Why do you feel your operating rights, in view of the fact you have been operating at a reasonable profit here, only have a value of \$3,000.00?

A. \$3,000.00 for the trucks, and \$3,500.00 for the operating rights.

Q. Oh, yes; in any event though, you are willing to dispose of them at that figure?

A. That is right.

Q. You think that is a reasonable price for those rights?

A. I think it is reasonable, not only for us but for them, because I feel that they can operate and have a profit out of the transaction.

Q. You will retain all your employees, or how many do you have?

A. No, we have approximately twelve or fourteen, and there might be two of them would transfer to the Rock Island Motor Transit Company if they so wish.

583 Q. In the event they do not wish, you would retain them, is that correct?

A. Yes, we also have a warehouse and storage business, which is quite large.

Q. You do a local transfer business?

A. We have a building that is 40 x 136, two stories, and we store household goods and effects of that kind.

Q. How many pieces of equipment do you operate?

A. We have all total eleven pieces.

Q. Is this the only equipment you are disposing of to the Rock Island Motor Transit Company? Is that the only equipment used in the general commodity business?

A. That is correct.

Q. The other, I presume, are the van type?

A. The van type, and used for the transportation of household goods and for general transfer work in Harlan and vicinity. We have an area, I would say, of 50 miles out. We transport stuff for the farmers and other customers.

Q. Now, what is the competition you experience in that territory? What is the competition at the present time?

A. I just don't quite understand.

Q. So far as the general commodity service you render is concerned, what other carriers compete with you?

A. We have a local man there, the Rapid Transfer Company, who lives in Harlan.

Q. I am speaking of the interstate competition.

584 A. He is an interstate operator, operates from Omaha to Harlan and intermediate points on the interstate business. The business relationship betwixt the two of us is very friendly.

Q. What are the other carriers?

A. The Roberts Transfer of Audubon operates interstate between Omaha and Audubon and all intermediate points. As competitors, we naturally go out and secure whatever business we can and they do likewise.

Q. Is the A. E. Miller Motor Freight Lines in that territory?

A. Not to my knowledge.

Q. That is one of the interveners in this proceeding.

A. I don't know where they operate.

Q. You do have other carriers that compete for business in the territory?

A. Oh, yes.

Q. You don't have a monopoly on the business there?

A. Oh, no. There is an additional carrier, Claussen Transfer, which operates from Omaha to Harlan, Manning and Coon Rapids. There is ample competition.

Q. Now, how much of this purchase price has been paid?

A. One dollar.

Q. Is it your understanding the balance will be paid in cash?

A. Yes, sir.

Q. Upon approval by the Commission?

585 A. By the Commission.

Q. The Iowa Commission and the Interstate Commerce Commission?

A. Yes, sir.

Q. Presumably, you value the intrastate and the interstate certificate at the same amount?

A. I did.

Q. Is your business about 50-50?

A. Just about, yes.

Exam. CLIFFORD: That is all I have, Mr. Frederickson.

Mr. CASSELL: That is all. Thank you.

(Witness excused.)

Exam. CLIFFORD: I might recall the accountant for the Rock Island, Mr. Zenke. There is a question I neglected to ask you and that was with respect to the amortization of the amount of the purchase price that may be assigned to the value of the franchises to be acquired. Does the applicant here, the Rock Island Motor Transit Company, propose to write off that amount immediately out of its surplus account, or does it have a surplus account? Well, in any event, as I understand it, that can not be written off immediately on consummation of the transaction. What would you suggest with respect to a plan of amortization? What has the Commission done in the past? What policy has it followed in connection with other acquisitions by the Rock Island Motor Transit Company?

586 Mr. ZENKE: We have been writing off—I believe the last three acquisitions have been written off on equal monthly installments over a five-year period.

Exam. CLIFFORD: You have no objection to adhering to that plan in connection with this particular transaction?

Mr. ZENKE: No, sir.

Exam. CLIFFORD: That is all.

A. E. MILLER was sworn and testified as follows:

Direct Examination.

Q. (By Exam. CLIFFORD) Mr. Miller, I think you entered your appearance for the A. E. Miller Freight Lines as your interests may appear. Could you elaborate on that after hearing the testimony? Do you wish to change your position here in favor of or in opposition to the application?

A. I wouldn't have any opposition to it, no.

Q. In other words, you are not opposed to the granting of the transfer?

A. I am not opposed to the granting of the transfer. It does not affect me any, but I didn't know when I come out here whether it would or it wouldn't.

Exam. CLIFFORD: That is all. Thank you.

(Witness excused.)

Exam. CLIFFORD: Does that complete the applicant's case?

Mr. CASSELL: Applicant rests.

Exam. CLIFFORD: Do the parties desire to file briefs?

587 Mr. CASSELL: No desire on my part.

Exam. CLIFFORD: Are the parties agreeable to waiving the service of the Examiner's proposed report?

Mr. CASSELL: I am agreeable.

Exam. CLIFFORD: Are you Mr. Miller?

Mr. MILLER: Yes.

Exam. CLIFFORD: In the event the Commission in the consideration of this transaction finds it necessary to request the parties to submit additional information, I presume they are agreeable to acceding to any such requests?

Mr. CASSELL: We are, yes.

Exam. CLIFFORD: And Mr. Miller also to the extent he has participated?

Mr. MILLER: Yes.

Exam. CLIFFORD: If there is nothing further to come before the Examiner, the hearing is concluded.

(Whereupon at 3:00 P. M., November 17, 1943, the hearing in the above-entitled matter was closed.)

589 This report will not be printed  
in the permanent series of  
Motor Carrier reports of the Commission  
INTERSTATE COMMERCE COMMISSION  
No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES)—  
CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. E. FREDERICKSON AND D. H. FREDERICKSON

Submitted November 17, 1943. Decided November 28, 1944

Purchase by The Rock Island Motor Transit Company of certain operating rights and property of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son, and acquisition of control of said operating rights and property by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees) through said purchase, approved and authorized, subject to condition.

Martin L. Cassell, Jr., for vendee.

Lyle R. Higgins for vendors.

A. C. Miller for intervener.

*Report of the Commission*

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND  
MILLER

BY DIVISION 4:

The Rock Island Motor Transit Company, of Chicago, Ill., herein called Transit, and J. H. Frederickson and D. H. Frederickson, partners, doing business as J. H. Frederickson & Son, of Harlan, Iowa, by joint application filed October 5, 1943, seek authority under section 5, Interstate Commerce Act, for purchase by the former of certain operating rights and property of the latter for \$6,500. Transit is controlled through ownership of its entire outstanding capital stock by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees), also by Chicago, herein called the railroad. By supplemental application filed October 27, 1943, the trustees of the railroad seek authority under the same section to acquire control of said operating rights and property of vendors through the proposed purchase. Hearing has been held at which a motor carrier intervened but did not oppose the application. The parties waived service of an examiner's proposed report.

Transit's corporate history and relationship with the railroad are described in *Rock Island Motor Transit Co.—Purchase—Corpier*, 39 M.C.C. 561, and the case therein cited. Transit operates in interstate or foreign commerce as a motor-vehicle common carrier of passengers and property. The instant application involves an extension of its freight operations which are conducted pursuant to certificates issued in No. MC-29130 and various sub-numbered proceedings, principally over regular routes which generally parallel the railroad in Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee, and Texas. One such route, over U. S. Highway 6, across Iowa from Davenport to Council Bluffs, via Des Moines and Atlantic, immediately parallels the line of the railroad, except between Atlantic and Council Bluffs, between which points the highway diverges to the south. Certain of Transit's present freight operations are subject to the

590 limitation that service shall be solely that which is auxiliary to and supplemental of the train service of the railroad, and either that freight so handled shall have an immediately prior or subsequent rail haul by the railroad, or that it shall not be transported from, to, or between more than one of specified key points. However, its route between Atlantic and Omaha, Nebr., over U. S. Highway 6, serving all points which are stations on the railroad, is part of a route to and from Chicago, Ill., via Des Moines, acquired pursuant to authority granted in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M.C.C. 451, and is not so restricted. On the Atlantic-Omaha segment of its route, the only points which are stations on the railroad and which are served by Transit are Atlantic, Oakland, Council Bluffs, and Omaha.

In Nos. MC-29130 (Sub-No. 24TA) and MC-29130 (Sub-No. 28TA) and other sub-numbered proceedings, Transit was granted temporary authority until December 31, 1944, to transport dangerous explosives to, from, and between points on its authorized regular routes, to transport general commodities over a regular route between Hutchinson, Kans., and a naval aviation base in that State, and to perform other temporary operations principally to defense installations. It has pending other applications<sup>1</sup> for authority under section 5 to purchase operating rights over routes in eastern Kansas. It also has pending several applications under section 207 for extension of its operating rights, including No. MC-29130 (Sub-No. 33), seeking authority to serve Corley, Iowa, a point on the routes proposed to be purchased herein from the partnership.

Pursuant to certificates issued June 7, 1941 and March 15, 1943, in Nos. MC-530 and MC-530 (Sub-No. 1), respectively, the partnership operates in interstate or foreign commerce as a motor-vehicle common carrier of general commodities over regular routes between Harlan, Iowa, and Omaha, over Iowa Highway 64, serving the intermediate points of Avoca, Minden, Neola, Underwood, Weston, and Council Bluffs, and the off-route point of Shelby, Iowa, and between Avoca and Atlantic, Iowa, over U. S. Highway 59 from Avoca to

<sup>1</sup> No. MC-F-2374, The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colton, trustees)—Control; The Rock Island Motor Transit Company—Purchase—Rolland Kinney, and No. MC-F-2394, Same—Control; Same—Purchase—W. A. and M. K. Remmers.

junction of U. S. Highway 6, thence over the latter to Atlantic, and return over Iowa Highway 83 to Avoca, serving the intermediate points of Hancock, Oakland, Atlantic, Marne, and Walnut, Iowa; and over irregular routes, transporting (a) household goods and emigrant movables between Harlan and points within 15 miles thereof, on the one hand, and, on the other, points in Minnesota, Nebraska, South Dakota, Missouri and Illinois, and (b) livestock, between Harlan, and points within 20 miles thereof, on the one hand, and, on the other, Omaha. The partnership also holds intrastate rights under Iowa certificate No. 493, over the above-described regular routes.

On February 10, 1943, in No. MC-FC 30046, the partnership was authorized to lease for a period expiring December 31, 1946, the operating rights confirmed September 18, 1937, in No. MC-4519, covering operations as a common carrier by motor vehicle of general commodities over a regular route between Omaha and Portsmouth, Iowa, over Iowa Highways 7 and 191, serving Council Bluffs, Weston, Underwood, Neola, and Persia, Iowa, as intermediate points and the off-route point of Panama, Iowa. From Omaha to Neola, 23 miles; the leased route coincides with the partnership's route. Transit has not requested authority to assume such lease, and it will not be further considered herein.

591 Under option agreement dated August 23, 1943,

Transit would purchase for \$6,500, all of the partners' above-described regular-route, general-commodity operating rights covered by the certificates issued in Nos. MC-530 and MC-530 (Sub-No. 1), corresponding intrastate rights under Iowa certificate No. 493, and 1 truck, 1 tractor, and 1 semitrailer. One dollar of the purchase price has been paid and the balance would be payable within 30 days after approval herein. The operating rights are valued by the parties at \$3,500, the truck at \$1,000, tractor \$1,200, and the trailer \$800.

The railroad's general balance sheet as of September 30, 1943, shows assets aggregating \$593,968,147, consisting of: Investments \$481,233,926, chiefly investment in road and equipment \$372,797,121, and investments in affiliated companies \$106,164,106; current assets \$95,117,128, principally cash, temporary cash investments and material and supplies; deferred assets \$826,785; and unadjusted debits \$16,790,308. Liabilities were: Capital stock \$128,892,512; long-term debt \$305,462,727; current liabilities \$29,970,759.

chiefly accrued tax liability; deferred liabilities \$115,941,893, principally matured interest in default; unadjusted credits \$65,786,298, including accrued depreciation on road and equipment \$56,766,819; and corporate surplus (debit balance) \$52,086,042. Its income statements for 1941, 1942, and the first nine months of 1943, show net income of \$4,153,987, \$20,024,394, and \$23,012,502, respectively.

Transit's balance sheet as of September 30, 1943, shows assets aggregating \$679,068, consisting of: Current assets \$275,633, chiefly cash \$89,743, and accounts receivable \$144,834; carrier-operating property, less depreciation, \$267,037; intangible property, less amortization, \$65,169; investments and advances—associated companies \$3,545; and deferred debits \$67,684, chiefly prepayments. Liabilities were: Current liabilities \$198,289, principally accounts payable \$133,136 and wages payable \$35,710; advances payable—associated companies \$412,631; deferred credits \$556; injuries, loss and damage reserve \$3,172; common capital stock \$100,000; and earned surplus (debit balance) \$35,580. Its income statements for 1941, 1942, and the first nine months of 1943, show net income, after provision for income taxes, of \$10,333, \$107, and deficit of \$2,384, respectively.

The partnership's balance sheet as of October 31, 1943, shows assets aggregating \$2,686, consisting of: Current assets \$1,420, chiefly cash \$290 and accounts receivable \$749; and carrier-operating property, less depreciation, \$1,266. Liabilities were: Partnership capital \$2,686. Its income statements covering general-commodity operations for 1941, 1942, and the first ten months of 1943 show net income of \$4,255, \$3,772, and \$1,382, respectively.

J. H. Frederickson and his son engage in other enterprises, among which are wholesale tobacco, service station, warehouse and storage, and local transfer businesses, management of which is divided between the partners. The father, however, has been sole manager of the transportation business, and because of the condition of his health, has been advised by his physician to dispose of some of his operations. The partnership owns eleven pieces of equipment, and the vehicles not included in the instant transaction would be used in transporting household goods and livestock under the retained irregular-route authority, and in other businesses. Transit would offer employment to employees of the partners engaged in the operations involved who desire employment with Transit.

Transit operates five or six daily schedules over U. S. Highway 6 across Iowa: West of Atlantic, U. S. Highway 6

passes through Oakland, a point on a north-south branch line of the railroad between Harlan and Carson, Iowa, which crosses the main line at Avoca. The routes to 592 be purchased from the partnership parallel the railroad between Atlantic and Omaha and between Harlan and Oakland, and every point authorized to be served by the partnership is a station on the railroad's main or branch lines lying between Atlantic and Omaha.

Omaha is an important jobbing center for the territory. The partnership serves 10 points,<sup>2</sup> having a combined population of approximately 9,000, which are not presently served by Transit, but which are stations on the railroad where terminal facilities are maintained and would be utilized by Transit. Harlan, the largest of such points, is the northern terminus of the branch line of the railroad, above mentioned, and has 3,700 inhabitants. Several motor carriers serve the considered area and all of the points on the routes here involved, although no single carrier serves all points served by the partnership. Four points, Harlan, Underwood, Minden, and Neola, are served by other railroads.

Under present conditions, I. c. l. freight eastbound from Omaha to points on the partnership's route between Omaha and Atlantic, is transported by Transit to Atlantic where it is backhauled and distributed by westbound local train. Des Moines, rather than Atlantic, has been used as the break-bulk point on westbound rail freight for this territory. The railroad does not operate a local eastbound train. If such freight is destined to a point on the Harlan-Oakland branch lines of the railroad, it is again transferred at Avoca. Such combination service by Transit and the railroad at points between Omaha and Atlantic on the partnership's route requires two or three days depending upon connections. If the authority sought is granted, Transit proposes to provide all-truck service eastbound from Omaha to points on the route acquired, resulting in expediting delivery in some instances by as much as two days. For certain of the considered points it would also provide the only single-line motor-carrier service from more distant manufacturing and jobbing centers such as the Twin Cities and Chicago. A study made by an operating official of the railroad shows that savings of 38,157 car miles per annum and approximately \$5,000 in overtime expense to the railroad would re-

<sup>2</sup>Harlan, Avoca, Walnut, Margo, Hancock, Shelby, Minden, Neola, Under-

sult. Approximately 100 freight cars per month would be released to handle carload traffic of the railroad, with corresponding reduction of congestion in terminals, more efficient use of manpower, and faster movement of all of the railroad's traffic. No train miles would be saved.

A representative of the Omaha Chamber of Commerce, and a number of shippers from several points on the routes involved, testified in support of the application, expressing a need for expedited service resulting from coordinated rail and motor service for reduction in handling in transit, and other advantages to be derived from single-line service and responsibility, such as simplification of claim adjustments.

The partnership's circular route from Avoca to Atlantic via Oakland, and return via Walnut, duplicates Transit's present route between Oakland and Atlantic, 28 miles, although service is authorized by the partnership on such duplicate segment in an eastbound direction only. It should also be noted that the partnership's rights from Atlantic to Avoca permit westbound service only. If the transaction is approved, Transit plans to re-route at least one of its daily schedules now operated over U. S. Highway 6 so as to render daily service to points west of Atlantic into Omaha. Due to the one-way character of the authority involved, it would be necessary to route eastbound schedules from Omaha via Neola to Avoca, thence south to Oakland, and east to Atlantic. In connection with the routes to be acquired, break-bulk points have not yet been determined, but the railroad's traffic, as well as that of Transit, is concentrated principally at Des Moines and secondarily at Omaha at the present time. Because of the relatively short distances involved between Atlantic and Omaha over the partnership's routes, 73 miles eastbound and 54 miles

593 westbound, Transit considers it impractical to perform motor-carrier service over the routes to be acquired if such operations are limited solely to handling of freight having an immediately prior or immediately subsequent rail haul, and, further, that any such limitation would be expensive and would result in tying up railroad equipment. As stated, Transit is already authorized to render an unrestricted all-truck service between Atlantic and Omaha over U. S. Highway 6 as part of its operations between Chicago and points west of Omaha. Hence the naming of Atlantic and Omaha as key points between, or to or from more than one of which service would be prohibited

all-truck service via both points over Transit's present route, or the serving of both points on all-truck freight. It is clear that the L.C.L. service of the railroad to and from points on the partnership's routes is uneconomical, inefficient, and slow, and that the motor-vehicle facilities of Transit can be used to the advantage of the railroad and the shipping public by speeding up deliveries at such points and releasing rail cars for other service.

Transit proposes to amortize in equal monthly installments over a period of five years the amount of increase in its "Other Intangible Property" account resulting from the instant transaction, and our findings will be conditioned accordingly.

We find that purchase by The Rock Island Motor Transit Company of the previously-described operating rights and property of J. H. Frederickson and D. H. Frederickson, partners, doing business as J. H. Frederickson & Son, and that acquisition of control of said operating rights and property by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees) through said purchase, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2) (a), will be consistent with the public interest, will enable The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that if the transaction is consummated, The Rock Island Motor Transit Company will be entitled to a certificate covering the previously-described portion of rights granted in Nos. MC-530 and MC-530 (Sub-No. 1), which rights are herein authorized to be unified with rights otherwise confirmed in The Rock Island Motor Transit Company, with duplications eliminated; *provided, however*, that, if the authority herein granted is exercised, The Rock Island Motor Transit Company shall amortize in equal monthly amounts over a maximum period of five years, commencing with the date of consummation herein, the amount of increase in its "Other Intangible Property" account resulting from the instant transaction, in a manner consistent with the provisions of the Uniform System of Accounts for Class I Motor Carriers, or in lieu of amortization in any month of the 5-year period, it may write off to surplus the unamortized balance of the increase in its "Other Intang-

ible Property" account, so as to remove from such account within said 5-year period, either through amortization or write-off, the entire amount of the increase.

An appropriate order will be entered.

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## ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 28th day of November, A. D. 1944

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY (JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

*It is Ordered*, That purchase by The Rock Island Motor Transit Company, of Chicago, Ill., of certain operating rights and property of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son, of Harlan, Iowa, and acquisition of control of said operating rights and property by The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnor, trustees), also of Chicago, through said purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

*It is Further Ordered*, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

*It is Further Ordered*, That unless the authority herein granted is exercised within 180 days from the date hereof, this order shall be of no further force and effect.

*It is Further Ordered*, That recital in said report of balance-sheet and other financial data shall not be construed

as approving accounting methods which have been followed or expenditures represented thereby.

*It is Further Ordered*, That before recording the purchase upon its books, The Rock Island Motor Transit Company shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

*And it is Further Ordered*, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act except section 5 thereof, as expressly determined herein.

By the Commission, division 4.

W. P. BARTEL,  
Secretary

597

Jan-1 '45 395877

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY

JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES  
La Salle Street Station  
Law Department

MARTIN L. CASSELL, JR.  
General Attorney

Chicago 5, Ill.  
December 28, 1944

Re: MC-F-2327—The Rock  
Island Motor Transit  
Company Acquisition—  
Frederickson

Hon. W. Y. Blanning  
Director  
Bureau of Motor Carriers  
Interstate Commerce Commission  
Washington 25, D. C.

Dear Sir:

Under date of November 28, 1944, Division 4 released its order permitting the acquisition of the interstate motor carrier authority together with certain physical property of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son.

The order attached to the report in paragraph three requires that the parties notify the Commission in writing, if they desire to consummate the transaction, the intended

date of consummation.. This letter is being written in accordance with such requirement, and notice is hereby given that the parties intend to consummate this transaction as of January 15, 1945, and that on such date The Rock Island Motor Transit Company will take over the operations of J. H. Frederickson & Son.

You will be further advised, in accordance with the Commission's order, as to the actual consummation having taken place. Steps are being taken to insure compliance with sections 215 and 217 of the Interstate Commerce Act.

Yours very truly,

MARTIN L. CASSELL, JR.

MLC:LM

599

January 3, 1945

Please refer to file  
Finance: No. MC-F-2327

Mr. Martin L. Cassell, Jr.,  
The Rock Island Motor Transit Company,  
139 West Van Buren Street,  
Chicago 5, Ill.

Dear Mr. Cassell:

This will acknowledge receipt on January 1st of your letter, dated December 28th, advising that the parties intend to consummate the transaction authorized in the above-numbered proceeding, entitled The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, on January 15, 1944. We shall expect confirmation of same at that time.

It is assumed that appropriate attention is being given to the preparation and submission of journal entries proposed for recording the transaction on the books of the purchaser.

Very truly yours,

W. Y. BLANNING,  
Director.

Cy—Mr. Frank Purse,  
Director, District No. 8,  
Chicago 7, Ill.

Mr. Wm. L. Snodgrass,  
Director, District No. 10,  
Kansas City 6, Mo.

OC

600

Jan 13 '45 399468

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES  
La Salle Street Station,  
Law Department

MARTIN L. CASSELL, JR.  
General Attorney

Chicago 5, Ill.  
January 11, 1945

*Re:* MC-F-2327—The Rock Island Motor  
Transit Company Acquisition Frederickson

Hon. W. Y. Blanning  
Director  
Bureau of Motor Carriers  
Interstate Commerce Commission  
Washington 25, D. C.

Dear Sir:

Please refer to my letter of December 28, 1944, and yours of January 3, 1945, concerning the above captioned file.

Since my letter of December 28th the parties have found it expedient because of operating reasons to advance the date of consummation from January 15th to January 22, 1945. Will you please note this change in plans.

Journal entries are being prepared and will be submitted, in accordance with the Commission's order, prior to recording the same upon the books of the purchaser.

You will also receive confirmation on the actual date of consummation of that event having taking place.

Yours very truly,

MARTIN L. CASSELL, JR.

MLC:LM

cc—Mr. Frank Purse  
Mr. Wm. L. Snodgrass

601

January 22, 1945

Please refer to file  
Finance: No. MC-F-2327

Mr. Martin L. Cassell, Jr., General Attorney,  
The Rock Island Motor Transit Company,  
139 West Van Buren Street,  
Chicago 5, Ill.

Dear Mr. Cassell:

This will acknowledge receipt of your letter of January 11th, advising of the parties' intention to advance the date of consummation of the transaction authorized in the above-numbered proceeding, entitled The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, from January 15 to January 22, 1945.

Your statements with respect to submission of journal entries and confirmation of date of consummation have been noted.

Very truly yours,

W. Y. BLANNING,  
*Director.*

Cy—Mr. Frank Purse,  
Director, District No. 8,  
Chicago 7, Ill.

Mr. Wm. L. Snodgrass,  
Director, District No. 10,  
Kansas City 6, Mo.

OC

602

Jan 24 '45 402388

THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY

JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES  
La Salle Street Station  
Law Department

MARTIN L. CASSELL, JR.  
General Attorney

Chicago 5, Ill.  
January 22, 1945

Re: MC-F-2327—The Rock Island Motor  
Transit Company Acquisition of  
J. H. Frederickson & Son

Hon. W. Y. Blanning  
Director  
Bureau of Motor Carriers  
Interstate Commerce Commission  
Washington 25, D. C.

Dear Sir:

This is to advise that in accordance with our previous notification, The Rock Island Motor Transit Company has consummated the transaction approved by the Interstate Commerce Commission between itself and J. H. Frederickson & Son as of today, January 22, 1944, and has taken over the operation of the several routes involved.

The Rock Island Motor Transit Company has made compliance with Sections 215 and 217 of the Act in so far as they apply to the operation.

The journal entries have not yet been prepared, but should be ready for submission to you within the next ten days.

Yours very truly,

MARTIN L. CASSELL, JR.

MLC:LM

603

January 25, 1945

Please refer to file  
Finance: No. MC-F-2327

Mr. Martin L. Cassell, Jr., General Attorney,  
The Rock Island Motor Transit Company,  
139 West Van Buren Street,  
Chicago 5, Ill.

Dear Mr. Cassell:

This will acknowledge receipt of your letter of January 22nd, confirming the intended date of January 22, 1945 as the actual date of consummation of the transaction authorized in the above-numbered proceeding, entitled The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson. Our records are being posted accordingly.

Your statement with respect to submission of journal entries has been noted.

Very truly yours,

W. Y. BLANNING,  
*Director.*

Cy—Mr. Frank Purse,  
Director, District No. 8,  
Chicago 7, Ill.

Mr. Wm. L. Snodgrass,  
Director, District No. 10,  
Kansas City 5, Mo.

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*Order*

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of February, A. D. 1945.

No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE  
WHITE LINE MOTOR FREIGHT COMPANY,  
INCORPORATED, *et al.*

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

No. MC-29130

(Formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT CO., COMMON  
CARRIER APPLICATION.

Upon consideration of the records in the above-entitled proceedings, and good cause appearing therefor:

IT IS ORDERED, That Nos. MC-F-445 and MC-F-2327, and No. MC-29130 insofar as it embraces operating rights acquired pursuant to order entered in No. MC-F-445, be, and they are hereby, reopened for reconsideration on the present records, solely to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor carrier service performed by The Rock Island Motor Transit Company is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the condition, if any appears necessary, which should be imposed so as to make the authority granted to The Rock Island Motor Transit Company subject to such further conditions or restrictions as the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service.

By the Commission.

(Seal)

W. P. BARTEL,  
*Secretary.*

MF-1484

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Interstate Commerce Commission

No. MC-F-445<sup>1</sup>

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY,  
INCORPORATED, *et al.*

Decided March 4, 1946

Upon reconsideration, the certificate issued in No. MC-29130, insofar as it embraces motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-445, prior reports 5 M. C. C. 451, and 15 M. C. C. 763, ordered modified, and the certificate to be issued covering the motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-2327, prior report 39 M. C. C. 824, ordered framed, in a manner as to subject the motor common carrier operations thereunder to stated conditions or restrictions calculated to insure that the service given shall be limited to that which is auxiliary to, or supplemental of, train service.

Appearances as shown in prior reports, also: H. L. Lewis and R. J. McBride for intervenor.

*Report of the Commission on Reconsideration*

BY THE COMMISSION:

The Rock Island Motor Transit Company of Chicago, Ill., hereinafter called Transit, is a wholly owned subsidiary of The Chicago, Rock Island, and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, trustees), a common carrier by railroad subject to part I of the Interstate Commerce Act, hereinafter called the railroad. It operates, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers between Bureau and Peoria, Ill., and as a common carrier by motor vehicle of property over regular routes which follow generally the lines of the railroad in Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee and Texas. Certain of its motor-carrier operations are conducted under author-

<sup>1</sup>This report also embraces No. MC-F-2327, The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson, and No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Co., Common Carrier Application.

ity acquired by purchases approved and authorized by this Commission under former section 213 and under section 5 of the act. Others are conducted under authority acquired by various applications under section 207.

607 When the Motor Carrier Act, 1935, became effective Transit was not in operation. Its first authority to operate as a common carrier by motor vehicle of property was acquired by purchase from White Line Motor Freight Company, Incorporated, hereinafter called White. This purchase was approved and authorized under former section 213 on April 1, 1938, in the title proceeding herein, 5 M. C. C. 451, and 15 M. C. C. 763. By the operating authority so acquired, which is now embraced in the certificate issued in docket No. MC-29130 (which replaced White's application No. MC-49147), Transit is authorized to operate, subject to certain conditions hereinafter discussed, as a common carrier by motor vehicle of general commodities, with exceptions not here important, between Omaha, Nebr., and Silvis, Ill.,<sup>2</sup> over a regular route through Des Moines and Davenport, Iowa, consisting of U. S. Highway 6 between Omaha and the junction of U. S. Highway 6 and Illinois Highway 92 not far from Davenport, Iowa, and Illinois Highway 92 between this junction and Silvis, with service at all intermediate points on the route and at the off-route points of Cedar Rapids, Muscatine, Bettendorf, and Oxford, Iowa.

Subsequent to this original purchase from White, Transit by other purchases and by applications under section 207 of the act, acquired additional motor common carrier operating authority. It now operates, subject to various restrictions affecting different route segments, a system of regular through routes and feeder routes extending between the Twin Cities and Chicago, on the one hand, and, on the other hand, Omaha and Kansas City, Mo., and points beyond as far west as Goodman, Kans., and certain other routes in Texas and Arkansas. We are concerned here only with the first-purchased Omaha-Silvis segment of Transit's now authorized Omaha-Chicago routes and with a segment of alternating route (between Omaha and Atlantic, Iowa), the purchase of which was approved and authorized in No. MC-F-2327 mentioned in footnote 1.

<sup>2</sup> The claimed rights of vendor White between Silvis and Chicago, Ill., were not proved.

As disclosed by the original report in the title case, 5M. C. C. 451, Transit in seeking authority for this original purchase from White represented that its proposal sprung primarily from a desire to conduct a rail-coordinated motor service and thereby to improve the railroad's service to the public with the hope of retrieving less-than-carload traffic which had been lost by the railroad to motor carriers. It offered to abandon any operating rights to the vendor except those over the highway routes which closely paralleled the railroad's main Omaha-Chicago rail line, and those to and from Cedar Rapids and Muscatine, Iowa, both of which are also served by the railroad. It proposed to conduct three distinct types of service (1) a co-ordinated rail-truck service, which was to be auxiliary to existing all-rail service and in which merchandise cars would be moved to certain set-out points from which distribution would be made by truck; (2) an all-motor service on short hauls between stations, where feasible and economical, as a substitute for rail service; and (3) an all-motor service restricted to points on the railroad, but in addition to, rather than as a substitute for, rail service. The manner in which it was proposed to effect coordination of truck and rail service and the advantages resulting from such coordination were shown in detail.

Division 5 found that the general plan of operation proposed was similar to that outlined in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, 5 M. C. C. 9, and 5 M. C. C. 49, hereinafter called the *Barker* case, wherein authority for the acquisition of motor common carrier operating authority by a railroad subsidiary had been conditioned so as to permit service by the railroad subsidiary under the acquired rights only at points which were stations on the railroad and, accepting Transit's offer to abandon all rights to serve points not on the railroad, approved and authorized the proposed purchase subject to conditions: (1) That Transit should not render service from, or to, or interchange traffic at, any point other than a station or the lines of the railroad, and (2) that the authority granted should be subject to such further limitations, restrictions, or modifications, as we might find it necessary to impose in order to insure that the service rendered should be limited to that auxiliary to, or supplemental of, train service and should not unduly restrain competition.

Among the routes acquired by Transit since its original purchase from White are a number of alternate, feeder,

and main-line routes which connect with its Omaha-Silvis route. Some of these were acquired by purchase and others in proceedings under section 207. To the time of the prior report in No. MC-F-2327, operation by Transit over each of its routes, however acquired, was subject without any important exceptions<sup>3</sup> to either definite conditions or restrictions calculated to insure that the service rendered should be limited to that which is auxiliary to, or supplemental of, service of the railroad or to a reserved right in this Commission in the future to impose such restrictions as may be necessary to insure that the service rendered shall be so limited. In the appendix hereto there are listed Transit's Omaha-Silvis operation and all of the operations connecting therewith together with a showing as to the conditions or restrictions attached to each of the operations.

609 The routes authorized to be purchased in the prior report in No. MC-F-2327 follow the line of the railroad between Omaha and Atlantic much more closely than do Transit's now authorized routes between the same points and will apparently become Transit's principal route between these points. The failure to restrict Transit's contemplated service over this route, which alternates with a segment of its Omaha-Silvis route acquired pursuant to authority granted in No. MC-F-445, to that which is auxiliary to, or supplemental of, the train service of the railroad, or to reserve the right so to restrict it in the future, if such reservation of authority is necessary, appears to be inconsistent with the principles which controlled the disposition of No. MC-F-445. Accordingly, to enable us to examine the matter further, by an order entered February 5, 1945, we reopened No. MC-F-2327, also Transit's original application No. MC-F-445, and No. MC-29130 to the extent it embraces operating rights acquired pursuant to order entered in No. MC-F-445, for reconsideration on the present records, solely to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor-carrier service performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the condition, if any appears necessary, which should be imposed to make the authority granted to Transit subject to such further condi-

<sup>3</sup> The sole exceptions are three short branch-line operations (Iowa City-Wellman, Davenport-Clinton-Muscatine, and Atlantic-Audubon) and the short Omaha-Griswold segment of alternate route.

tions or restrictions as we may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service.

By order entered March 17, 1945, the Regular Common Carrier Conference of the American Trucking Associations, Inc., was permitted to intervene. It represents that it is an association organized principally to foster, protect, and defend the interests of regular-route common carriers of property by motor vehicle and to advance their interests through cooperation and organization. The application in No. MC-F-2327 was not opposed at the hearing, and the transaction authorized by the prior report and order therein has been consummated but a certificate covering the acquired rights has not as yet been issued.

The Motor Carrier Act, 1935, now part II of the Interstate Commerce Act, as originally passed, section 202 (a) thereof, declared it to be the policy of the Congress—  
to regulate transportation by motor carriers in such a manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers \* \* \*, promote adequate, economical, and efficient service by motor carriers, \* \* \*, without \* \* \* unfair or destructive competitive practices; improve the relations between and coordinate transportation by, and regulation of, motor carriers and other carriers;  
610 riers; [and] develop and preserve a highway transportation system properly adapted to the needs of commerce \* \* \* and of the national defense.

Consistently with, and obviously in furtherance of, this policy, it was specifically provided by section 213 that no "carrier other than a motor carrier" nor any person controlled by, or affiliated with, any "carrier other than a motor carrier" should be authorized to consolidate or merge with, purchase, lease, operate under contract, or otherwise acquire control of, any motor carrier unless this Commission should first find not only that the transaction would be consistent with the public interest but further that it would "promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations" and would not unduly restrain competition.

By these provisions of the law the Congress indisputably intended not only to provide for the impartial regulation of *all* of the indicated modes of transportation but also affirmatively to foster, promote, and preserve the inherent

advantages of each mode of transportation. As an essential element of the latter purpose provision was specifically made to protect each mode of transportation from the suppression or strangulation thereof which might follow if control thereof were allowed to fall into the hands of a competing transportation agency. At the same time it was recognized that motor vehicles legitimately and properly could be used as a subordinate instrumentality for the improvement of non-motor-carrier transportation services. In order to allow such use in the public interest, the way was left open for carriers other than motor carriers, with this Commission's approval, to acquire control of motor carriers, but it was provided that such acquisition should not be sanctioned unless it first be found that the "transaction proposed would *promote* the public interest," and that, in a particular way, namely, "by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its [non-motor-carrier] operations" and would not unduly restrain competition.

After nearly 5 years of regulation under the Motor Carrier Act, 1935, in the course of which section 213 was construed and applied and during which effect was given in proceedings under section 207 of the act to the declared policy of the Congress as confirmed and furthered by section 213, the Transportation Act, 1940, was enacted. Therein the previously declared policy of the Congress was broadened somewhat to cover all modes of transportation and restated as the national transportation policy. At the same time section 213 was revised slightly and consolidated with section 5 of part I of the act.

In view of the intervening administrative construction and application of the declared policy of the Congress and of section 213 it is particularly significant  
611 that both the new declaration of policy and the revised section 5 were so framed as to confirm and approve, rather than disapprove, the manner in which those portions of the act had theretofore been construed and applied by us. Specifically the Transportation Act, 1940, declared it to be the national transportation policy impartially to regulate "all modes of transportation" so as "to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment of reasonable

charges \* \* \* without \* \* \* unfair or destructive competitive practices; \* \* \* all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail \* \* \*." Section 5 as amended to include former section 213, again provided that an acquisition of a motor carrier by a railroad or by any person controlled by, or affiliated with a railroad, should not be approved except after a finding "that the transaction proposed will be consistent with the public interest and will enable such rail carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Appraisal of the scope of the legislative approval of our prior administrative construction and application of the declared policy of the Congress and of section 213 which can be implied from the reenactment of both provisions without substantial change requires a brief examination of, at least, the leading reports of this Commission bearing thereon which antedated such reenactment.

The first important proceeding involving an application under section 213 by a railroad or railroad affiliate for authority to acquire control of a motor carrier was the *Barker* case. Therein an affiliate of the Pennsylvania Railroad sought authority to acquire control of Barker Motor Freight, Incorporated, a motor common carrier with regular and irregular-route, "grandfather" operations in Ohio, Michigan, West Virginia, Kentucky, Indiana, and Pennsylvania. Although the railroad's declared "primary purpose" in acquiring Barker's motor carrier operating rights was to facilitate the establishment of a coordinated truck-and-rail service in Ohio similar to that already furnished by it in territory east thereof, it did not, however, propose to abandon or dispose of those portions of the vendor's motor operations which would not contribute to coordinated truck-rail service. Instead, it argued that its greater financial resources, equipment, and other facilities would permit it to give improved and more frequent motor service over *all* the routes previously operated by Barker

including those *not* adjacent to Pennsylvania rails.

612 Division 5 after pointing out that under section 213 the proposed acquisition must not only be consistent

with the public interest but must also be such as would "actively promote the public interest and in a particular manner, namely, by enabling the acquiring [rail] carrier 'to use service by motor carrier to public advantage in its operations' ", found that some of Barker's routes could be used

by the railroad to public advantage, but concluded generally that future healthy competition between rail and truck service required disapproval of any proposal of railroads "to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations." The following excerpt from the report, 1 M. C. C. 101, 111, (with emphasis added) is significant:

Section 213 of the Motor Carrier Act, 1935, provides with respect to consolidations, mergers, and acquisitions of control that if the applicant be a carrier other than a motor carrier (e. g. a railroad), or a company controlled by or affiliated with such a carrier other than a motor carrier, we shall not give our approval unless we find "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." In other circumstances it is only necessary, under section 213, to find that the transaction proposed "will be consistent with the public interest." It is the obvious intent of the act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation and no doubt railroads were particularly in mind. The proof in such cases must show, not merely that what is proposed is *consistent* with the public interest, but that it will actively *promote* the public interest and in a particular manner, namely, by enabling the acquiring carrier "to use service by motor vehicle to public advantage in its operations." The proof must further show that the acquisition will not "unduly restrain competition."

The proof is convincing that over some of the routes in question the railroad can "use service by motor vehicle to public advantage in its operations." The motor vehicle can undoubtedly be used as a very valuable *auxiliary or adjunct to railroad service*, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such coordination of rail and motor-vehicle operations should be encouraged. The result will be a *new form of service* which should prove of much public advantage. Nor do we believe that the creation of this *new form of service* will "unduly restrain competition." On the contrary, it should have the opposite effect.

The railroad does not, however, so far as the routes in question are concerned, propose to confine itself to motor-

vehicle service auxiliary to its rail operations. It contemplates also the furnishing of motor-carrier service which would not be associated in this way with rail operations, pointing out that with its financial and other resources it would be able to expand and improve very materially the service which the partnership has been furnishing. As evidence that this would not "unduly restrain competition," it further points, as we have seen, to the large number of competing motor carriers now operating in the same territory.

613 While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, *we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations.* The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the *question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.*

In view of the considerations indicated, approval of the acquisition was withheld until receipt of notice of acceptance of certain conditions, including: (1) A condition that the motor service which would be rendered under the acquired authority should be confined "to service auxiliary and supplementary to that performed by the Pennsylvania Railroad Company in its rail operations and in territory parallel and adjacent to its rail lines," (2) a condition that Barker submit "a statement of the routes and a description of the territory over, and within which, it proposed to establish and operate such auxiliary and supplementary service," and (3) a requirement that Barker submit a statement of its proposed arrangements for divestment of all of

the acquired rights which should not be used in the performance of service auxiliary to, and supplementary of, the train service of the Pennsylvania Railroad.

These conditions were accepted, but the statement submitted of the routes proposed to be operated was not satisfactory, and in a supplemental report, 5 M. C. C. 49, the intent of the original report was restated by division 5 as follows (emphasis added):

The scope of the operations proposed to be retained is broader than intended by the conditions we stated in our prior report. Hence, it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions. *Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.*

Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called "station-to-station" service. In that connection the shortest distance between two rail terminals, in terms of available travel routes, is sometimes by rail and other times by highway. Alternate highway routes of varying degrees of circuitry also usually exist, and, of the latter, that one which most closely parallels the interested rail line ordinarily will be regarded as most appropriate for 614 auxiliary rail service, but this may not always be true. Sometimes the round-about character of a rail line is such that use in rail auxiliary service of a nonparallel shortcut highway is clearly in the public interest, and instances of this character are later mentioned.

On the other hand, the presumption should be against a highway route which exceeds by more than 20 percent the rail distance between points of substituted rail service; and, from the standpoint of an applicant railway *an intermediate off-rail point on a permissive route, whatever its direct or indirect character, should not be served if it already is receiving adequate service from a rail or highway common carrier.* The evidence shows that, over each of the routes here considered, service already is being performed by at least three motor carriers. Hence our order will provide, in connection with the routes here authorized, that *service by applicants' motor vehicles may not be accorded*

to, or traffic interchanged at, any point which is not also a station on the Pennsylvania, but this restriction is without prejudice to subsequent modification as later explained.

Various routes were thereafter discussed and specific routes, operation of which by the railroad would be approved were set forth in an appendix and applicants were advised that if "they deemed the imposed conditions too onerous, it would appear that they should refrain in the first instance from exercising the permissive authority granted." Consideration by the entire Commission of the case just discussed was never sought, but it was very early quoted by us with approval and added emphasis in *Northland-Greyhound Lines, Inc.—Purchase—Liederbach*, 5 M. C. C. 215.

From the date of the decision in the *Barker* case to shortly before enactment of The Transportation Act, 1940, the principles there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. During the period indicated approximately 40 of such cases were decided. In each of them approval of the proposed acquisition was made subject, except in unusual circumstances,<sup>4</sup> to the condition that in operations under the ac-

<sup>4</sup> Cases in which future service was not restricted to rail points fall into three classes of natural exceptions to the *Barker* case principles, namely, (1) those in which the restriction would be meaningless because all points on the acquired route were stations on the acquiring railroad, (2) those in which some of the points on the acquired routes involved, though located off-rail, were adjacent to the railroad and had no other adequate service, and (3) those in which the acquired motor carrier was in the nature of a branch or feeder line of the railroad reaching into territory not previously occupied or "permissive" territory as it is called in one case. Cases of the latter type are the most important and comprise a distinct line beginning with *Santa Fe Trails Stages, Inc.—Control—Central Arizona*, 1 M. C. C. 225. In that case, which was decided while the *Barker* case was still pending, and is differentiated in the first supplemental report therein, a Santa Fe Railway bus-operating affiliate was permitted to acquire by purchase a motor line between Salt Lake City, Utah, and Phoenix, Ariz. The acquired line was the only carrier in that part of the territory served lying between Flagstaff, Ariz., and Salt Lake City. Most of the points served in such territory were nonrail points. The acquisition promised improved bus service, which was needed. In the circumstances it was approved as "equivalent to the building by the railroad of a branch or feeder line into a territory not hitherto occupied \* \* \*." Other cases which followed the precedent so established are: *Northern Pac. Transport Co.—Purchase—Fitzhugh*, 15 M. C. C. 296; *Missouri Pac. Transp. Co.—Purchase—Dardanelle Transfer*, 15-M. C. C. 303; *Pacific Motor Trucking Co.—Purchase—Keithly*, 15 M. C. C. 427; *Bur-*

Footnote 4 con't. on pg. 600

quired operating rights no service should be given to or from, or any traffic interchanged at any point not a station on the line of the acquiring railroad. And in all except three instances approval was also conditioned that operation under the authority acquired should be subject to such further limitations or restrictions as we might find it necessary to impose in order to insure that service under the acquired rights should be limited to that which is auxiliary to, or supplemental of, train service.

615 Section 207 of the act, providing for the issuance of certificates of public convenience and necessity authorizing operations as a common carrier by motor vehicle, has never contained any provision paralleling the proviso of section 213 (now section 5) which requires special justification of acquisitions by railroads of motor-carrier operating rights. Giving effect, however, to the national transportation policy as declared by the Congress, and as colored by the provisos of sections 5 and 213, it has consistently been recognized in proceedings under section 207 that the preservation of the inherent advantages of motor-carrier service, the promotion of efficient motor-carrier service and of sound economic conditions in the motor-carrier industry, the avoidance of unfair and destructive competitive practices, and the development of an adequate transportation system employing in coordination all available agencies make it inconsistent with the public interest, and *a priori* something not required by public convenience and necessity, for railroads directly or indirectly through an affiliate to engage, except in special circumstances, in motor-carrier operations other than those auxiliary to, and supplemental of, their own train service and designed to be coordinated with train service to produce in effect a new and improved type of coordinated motor-rail service.

Footnote 4 con't. from pg. 599

*lington Trans. Co.—Purchase—Busskohol*, 15 M. C. C. 691; *Frisco Transp. Co.—Purchase—Parker*, 25 M. C. C. 96; *Rock Island Motor Transit Co.—Purchase—Peterson*, 25 M. C. C. 153; *Black Hills Stages, Inc.—Purchase—Black Hills Transp.*, 25 M. C. C. 171. The *Keithly* case extended the doctrine of the *Central Arizona* case to the extent of permitting acquisition of a right to serve a point already served by another rail carrier and not strictly in unoccupied territory, where the point involved was relatively unimportant and the invasion of another's territory was "inconsequential." In *Santa Fe Trail Transp. Co.—Purchase—Estep*, 5 M. C. C. 127, and 5 M. C. C. 145, penetration by the Santa Fe of Frisco territory was permitted, but only after the Frisco had disclaimed any interest

The leading case under section 207 is *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10. M. C. C. 221, 28 M. C. C. 5. Therein, we considered an application by an affiliate of the Kansas City Southern Railway Company for a certificate authorizing operation as a motor common carrier of general commodities over described regular routes. Although the applicant Transport Company represented that the proposed service would in all respects be auxiliary to, and supplemental of, the rail service of the Kansas City

616 Southern Railway and coordinated therewith, it

nevertheless proposed to move some shipments wholly by truck. Its proof disclosed no need for any new all-motor service but it did establish that the then existing less-than-carload or merchandise freight service of the Railway was expensive to give and in many respects unsatisfactory and inefficient; that the proposed coordinated rail-motor service would be a new and improved form of motor-rail service useful to the public and responsive to a public need; and that such service could not satisfactorily be given by the Railway using existing independent motor carriers. Discussing the question whether such new coordinated motor-rail service could be authorized "without endangering or impairing the operations of existing carriers contrary to the public interest" division 5, citing the *Barker* case and reaffirming the principles there followed, spoke as follows:

As has been indicated, protestants contend that if applicant be given the certificate which it seeks, they will suffer severely from the new competitive service which it will offer, not only in conjunction with the railway but on its own account. Competition is already so keen in the territory concerned that protestants can ill afford any further diversion of business. They particularly fear the competition of a motor carrier which, like applicant, would not be wholly dependent upon its own resources but would have the financial support of a parent rail company and, in addition, the benefit of the traffic-soliciting force and prestige of the latter and the use of many of its facilities. They go so far, indeed, as to assert that existence of independent motor carriers cannot in the long run be maintained, if railroads are to be allowed to go freely into the motor carrier business, and they express the belief that the inherent advantages of motor-carrier transportation cannot be preserved under such conditions. Interpreting their views, the thought seems to be that railroad-controlled motor car-

riers might ultimately be able to prevail over independent competitors, not because of any superiority in service or operation, but through their ability to draw upon the financial and other resources of their parent companies, and that the motor-carrier industry is more likely to develop in inherent strength and efficiency if it continues, as in the past, to remain largely in independent hands. In *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frl.*, 1 M. C. C. 101, 111, we expressed a somewhat similar thought as follows: “we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.”

617 Protestants now meet with the competition of the railway, but, in the case of the merchandise traffic handled in less-than-carload lots, that competition has not been particularly formidable. The railway now proposes to improve the handling of that traffic by establishing a coordinated truck-rail service in connection with applicant. As we have seen the conclusion is warranted that there is a public need for this coordinated service, that it is a new and different character of service which neither the railroads nor the trucks alone can supply, and that it cannot be furnished effectively and well except through the use of applicant's facilities. We do not believe that the development of this new form of service will seriously endanger the operations of protestants, but, in any event, the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers. If that principle had been followed, indeed, no motor-carrier service could have been developed.

However, while it has been shown that public convenience and necessity require the establishment of a service by ap-

plicant which will be coordinated with that of the railway, the record is devoid of proof that there is any need for the institution of service by applicant which is not required in such coordinated operations. In other words, there are plenty of motor carriers in this territory and it has not been shown that there is any need whatever for another motor carrier to furnish service such as the existing carriers furnish and having no close relation to rail operations. It follows that the certificate to be granted to applicant should be limited accordingly.

After some further discussion of the restrictions required effectively to limit the proposed operations "to those auxiliary to, or supplemental of, rail service and to prevent it [applicant] from engaging in operations which will duplicate and compete with service now adequately provided by carriers by motor vehicle," the authority sought was granted subject to conditions substantially identical with conditions 1 to 5, inclusive, but omitting 3A, as set forth in the appendix hereto.

The original report in this proceeding was adopted November 12, 1938. From that date to the early part of 1940, it was followed consistently and substantially identical restrictions were imposed in disposing of more than a score of railroad applications for motor-carrier operating authorities.

Thus by the report of division 5 in the *Barker* case, by our report on reconsideration in the *Northland-Greyhound* case, by the report of division 5 in the *Kansas City Southern* case, and by numerous other reports, in proceedings under both sections 207 and 213, which followed the *Barker* and *Kansas City Southern* reports, our administrative construction of section 213 and of the declared policy of Congress as it affected proceedings under both sections 207 and 213 was firmly established when the Transportation Act, 1940 was before the Congress. In these circumstances, the reenactment of section 213 as a part of section 5 and the restatement of the national transportation policy without any change suggesting any dissatisfaction with our established administrative construction thereof must be  
618 taken as a definite approval thereof, which speaks strongly against any significant departure therefrom in the future.

Condition 3 as originally imposed in the *Kansas City Southern* case was claimed by the carrier to be too restrictive in some instances in that it prevented use by a railroad of all-motor service in any instance and necessitated the continued use of lightly loaded way-freight trains to supply

short-haul service between comparatively adjacent way points. Accordingly in a report on oral argument and reconsideration in the *Kansas City Southern* case, 28 M. C. C. 5, we revised the condition to read as follows:

3. No shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points, or through, or to, or from, more than one of said points: \* \* \* [naming so-called key points].

In this report on reconsideration we recognized that the purpose of the conditions imposed by division 5 in the original report was "to limit the motor-carrier service to that which is auxiliary to, or supplemental of, the rail service and to prevent applicants from engaging in motor-carrier operations unconnected with any rail service." Our modification of the condition indicated did not accomplish any change in the previously accepted principles and was in no way inconsistent with the implied legislative approval of our earlier administrative interpretation.

Since our report on oral argument and reconsideration in the *Kansas City Southern* case, almost without exception, every grant of any significant motor-carrier operating authority to any railroad or railroad affiliate has been made subject to conditions substantially identical with those imposed in the *Kansas City Southern* case. In some instances where a key-point condition 3 would be ineffective for some reason, a prior or subsequent rail-haul condition similar to the original condition 3 has been employed. Others of the conditions also have been varied or omitted occasionally for special reasons, but the fundamental principle stated in the foregoing has never been lost sight of.

As previously stated, from the date of the decision in the *Barker* case to shortly before enactment of the Transportation Act, 1940, the principles there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. However, beginning with *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, and continuing until quite recently, the practice of specifically reserving the right later to impose such restrictions as might be necessary to insure that future operations under the acquired authority should be limited to the rendition  
 619 of service auxiliary to, or supplemental of, train service was not followed.<sup>5</sup> With such departure from the former practice there also appears to have developed a

<sup>5</sup> Except for certain cases decided very recently a restriction of the type mentioned was imposed in only three proceedings decided after the decision in the *Reddish* case.

tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might be rendered by a railroad or its affiliate under any acquired right.

Except for the fact that it may have been wrongly construed, the omission of a specific reservation of a right later to impose such restrictions for the purpose indicated was not particularly significant, for it appears to have been coupled with the thought that, in view of section 5 (9) of the act such a reservation of authority was unnecessary and added nothing to our authority under the statute. The tendency, if such there was, in the *Reddish* report and the others which followed it, to view the *Barker* case as though the restrictions there imposed were geographic only in their application apparently finds such justification as it has in certain language in the original report in the *Barker* case. Therein the conditions attached to the tentative approval were phrased in terms of service auxiliary to, and supplemental of, service of the railroad "in territory parallel and adjacent to its rail lines," and applicant was required to submit a "statement of the routes and description of the territory ~~over~~ and within which" it proposed to establish auxiliary and supplemental service. In its tender of compliance with these conditions applicant indicated that it construed "supplemental" service to mean transportation by the applicant motor carrier under its own motor-carrier tariffs "filling out and supplying transportation service additional to that of the railroad." Following this tender, in a supplemental report which mentioned at various points the "invasion of the territory" of other carriers, the proposed acquisition was approved, subject, among others, to a condition that the operating authority to be acquired should not be construed as including the right of rendering service from or to, or interchanging traffic at, "any point other than a station of the Pennsylvania Railroad." Relying apparently upon the tenor of these quoted excerpts the report in the *Reddish* case discussed in detail the territorial proximity of various motor routes of the vendor to the lines of the acquiring rail-affiliated motor carrier and approved the proposed acquisition subject to the condition that the vendee should abandon all irregular-route rights of the vendor and should not in the future serve over the acquired regular routes (except one), or interchange traffic at, "any point not a station on the (acquiring) railroad if such joint is more than

620 10 miles by highway from such a station." The formerly attached specific reservation of authority later to impose additional restrictions necessary to insure that the future service should be limited to that auxiliary to, or supplemental of, train service was omitted; and, as above indicated, such omission marked the virtual abandonment (until again very recently) of the use of such reservation of authority in rail-motor finance cases.

Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only territorially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied. Certainly those reports following the *Barker* case and in which the right later to impose specific restrictions limiting the operations of the vendee to those auxiliary to, and supplemental of, train service furnish no basis for such thought for, if so, the reservation would have been meaningless and futile because it was the practice in those cases specifically to require the vendee to agree to the cancelation of that part of any acquired operating authority extending into territory not served by the acquiring railroad. From a regulatory standpoint, motor-carrier operations conducted by a railroad affiliate should be the same whether the authority under which they are conducted was acquired by an application under section 207 or by purchase. There is no justification whatever for rigidly restricting, as we have done since the original decision in the *Kansas City Southern* case, railroad-controlled motor-carrier operations conducted under authority acquired under section 207 and at the same time allowing operation under purchased authority wholly free from all restrictions except territorial or geographical limits. Such, however, would be the illogical result of construing the *Barker* case restrictions as territorial limitations only. Moreover it would, in our opinion, be contrary to the plainly declared purpose of the reports in the *Barker* case. Despite the above-quoted references in those reports to operations within the "territory parallel and adjacent to" the rail lines of the Pennsylvania Railroad, a careful reading of each report in its entirety will show that there was no intent to allow the railroad-affiliated motor-carrier vendee to acquire any authority which would be used in the performance, even in territory parallel and adjacent to the railroad, of an all-motor service not related to, but competitive with, the railroad. Compare the con-

carring separate expression emphasizing this point in *Texas & P. Motor Transport Co.—Purchase—Johnson*, 5 M. C. C. 89, 93. As already indicated, the original *Barker* report recognized the intent of the Congress to place “special safeguards” about rail-motor acquisitions and

621 approve the proposed acquisition, not to enable the railroad to engage in motor operations unconnected with its rail service, but, solely, to enable it to use the motor vehicle as an “auxiliary or adjunct to railroad service” in the rendition of a coordinated rail-motor service, “a new form of service.” It was specifically indicated that “future healthful competition between rail and truck service” would not be fostered by giving “the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations.” When the vendee in its offer of compliance persisted in its proposal to conduct all-motor operations under the label of operations “supplemental” of rail service, the supplemental report declared the proposed operations to be “broader than intended by the conditions” stated in the prior report and to remove all doubt declared that “approved operations are those which are auxiliary or supplemental to train service,” and that they were “best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called “station-to-station” service. By way of contrast, it further listed non-approved motor operations in three specific categories: (1) Those which otherwise compete with the railroad itself; (2) those which compete with an established motor carrier; and (3) those which invade to a substantial degree the territory already served by another rail carrier. There could be no nonapproved operations of category (1) above, competing with the railroad itself, except *within* the territory served by the railroad. Unlimited operation *within* that territory was therefore definitely disapproved. A railroad cannot compete with itself except *in* its own service territory. Similarly nonapproved operations of category (2) above, namely those which compete with an established motor carrier, were all-motor operations either within or without rail-service territory, for clearly the purpose of the approved rail-motor operations was to compete, even more effectively than could rail service only, with established motor carriers. Nonapproved operations in both categories (1) and (2) would be meaningless if approved operations were not intended to be restricted except territorially.

In these circumstances and contrasting the language used and the supporting discussion with the much simpler lan-

guage which would have been adequate if it had been intended to restrict future operations of the vendee only territorially, it is clear that any tendency to treat the *Barker* case as an approval of future rail-motor operations which should be unrestrained except territorially, ignores the clear declaration that certain types of operations are disapproved wherever conducted, and must spring from a misinterpretation of the intent of the reports therein.

The above construction of the reports in the *Barker* case is confirmed by the reports in the *Kansas City Southern* 622 *ern* case, and others which followed it. It is inconceivable that the same language "auxiliary to, and supplemental of," should be used in scores of our reports for the purpose of limiting or defining motor-carrier operating rights but with *different* meanings depending upon whether the operating rights in question were acquired by an application under section 207 or by purchase. The original report in the *Kansas City Southern* case filed by the same division as had decided the *Barker* case, cites and discusses that case. Both this report and our report on reconsideration show a purpose, in the disposition of cases arising under section 207, to give weight to the same considerations and to impose the same special safeguards as had been applied in the *Barker* case. In these circumstances the lifting or borrowing of the language used in the *Barker* case to describe the approved service which might be given by the vendee under the acquired operating right, and the use of the same language, "auxiliary to and supplemental of," to define and limit the service which might be given under the authority granted in the *Kansas City Southern* case could not have been with any intent to use such words in the later case in any different sense than they had been used in the former case. This being true, the form and greater detail of the restrictions imposed in the *Kansas City Southern* case, where a general restriction against any service not auxiliary to, or supplemental of, train service was amplified by the addition of several subordinate but more specific restrictions, are significant as notice to everyone of the intent in the *Barker* case.

It is our opinion, originally indicated in the *Kansas City Southern* case and confirmed by nearly a decade of experience in motor-carrier regulations, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound

conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does not mean that it is as easy for one applicant, as for another, to  
 623 prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negating any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified.

In the light of the foregoing there remains for consideration the particular operations involved in the proceedings now before us.

No. MC-2327.—As above indicated, the transaction proposed in this proceeding was approved by division 4 without restricting, and without specifically reserving the right later to restrict, the future operations of Transit to service auxiliary to, or supplemental of, the train service of the railroad. The proceeding was, however, reopened by us for reconsideration on the present record to determine the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor-carrier service

performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and no certificate covering the operation in question has been issued to Transit.

The motor-carrier operating right, authority for the purchase of which was sought by Transit in this proceeding, consists of a two-way operation between Omaha and Harlan, Iowa, over a route through Avoca and a one-way (counterclockwise) loop operation from Avoca to Oakland to Atlantic, and thence back to Avoca. The route between Omaha and Avoca parallels the railroad's main line between Omaha, Des Moines, and Chicago. The Avoca-Harlan route parallels a branch line of the railroad between the same points. The Avoca-Atlantic one-way loop route parallels a branch line of the railroad extending south from Avoca through Oakland to Carson. Eastward from Oakland to Atlantic it does not follow any rail line but does duplicate a short segment of the Omaha-Silvis route, authority for the purchase of which, subject to a specific reservation of a right later to impose conditions to insure

624 performance only of auxiliary and supplementary service, was granted in the title case. The westbound Atlantic-to-Avoca segment of the loop route parallels the railroad's Omaha-Des Moines-Chicago main line and with the Omaha-Avoca segment gives Transit a through route westbound from Atlantic to Omaha paralleling the railroad's main line. Excluding the duplicating segment, these routes aggregate 81 miles of which 56 miles parallel the main line of the railroad and 25 a branch line.

As found in the prior report in this proceeding, Transit has shown that its acquisition of the routes would enable the railroad to use service by motor vehicle thereover to public advantage *in its railroad operations*, but it has not shown any need for, or any circumstance which would justify us in approving, its operation over such routes for the purpose of supplying an all-motor service competitive with other motor carriers and with the service of the railroad itself as distinguished from a service auxiliary to, or supplemental of, rail service. In the light of our foregoing discussion, it is clear that Transit's future operations as a common carrier by motor vehicle over the routes involved in this proceeding should be restricted in a manner to limit the service to that which is auxiliary to, or supplemental of, train service of the railroad. As disclosed by the prior report Transit is opposed to an immediately prior or immediately subsequent railroad restriction and it is clear that any such restriction is inappropriate here. The operat-

ing right involved in this proceeding will be made subject to restrictions patterned after those imposed in the report on oral argument and reconsideration in the *Kansas City Southern* case, including an appropriate key-point restriction which will be discussed further herein in connection with the title case.

*No. MC-F-445.*—By reason of the acquisition approved in the original report in this proceeding, Transit is now authorized to operate as a common carrier by motor vehicle between Omaha and Silvis over a regular route subject, however, to conditions 2 and 5A as set forth in the appendix hereto.

We have reopened the proceeding to determine what conditions or restrictions, if any, should now be imposed to insure that Transit's service over such route should be limited to that which is auxiliary to, or supplemental of, rail service. In view of the afore-mentioned condition numbered 5A in the appendix there is no question of our authority at this time to impose such restrictions as now appear appropriate to the end indicated.

Transit's Omaha-Silvis route is 328 miles in length and, except for the 56-mile Omaha-Atlantic segment, follows closely the railroad's Omaha-Chicago main line passing through Des Moines and Davenport. The points on the route authorized to be served by Transit in sequence beginning at Silvis, and their populations, 1940 census, are: In Illinois, Silvis, 2,990; East Moline, 12,359; Moline, 34,608; and Rock Island, 42,775; in Iowa, Davenport, 66,039; Bettendorf, 3,143; Durant, not stated; Muscatine, 18,286; Wilton Junction, 1,146; Atalissa, not stated; Cedar Rapids, 62,120; Oxford, not stated; Homestead, 285; Marengo, 2,260; Lodora, not stated; Victor, 763; Brooklyn, 1,408; Grinnell, 5,210; Newton, 10,462; Colfax, 2,252; Mitchellville, 769; Altoona, 640; Des Moines, 159,819; Dexter, 760; Stuart, 1,611; Meno, 441; Casey, 709; Adair, 874; Anita, 1,088; Wiota, not stated; Atlantic, 5,802; Oakland, 1,317; and Council Bluffs, 41,439; and in Nebraska, Omaha, 223,844. The points in Iowa authorized to be served by Transit under nonduplicating routes acquired pursuant to the authority granted in the *Frederickson* case, and their populations are: Marne, 245; Walnut, 902; Avoca, 1,598; Minden, 310; Neola, 841; Underwood, 251; Weston, 77; Shelby, 627; Harlan, 3,727; and Hancock, 256. All the foregoing points have other common-carrier service, either rail or motor, and the principal points have both types of service.

Omaha, the western terminus of the considered routes, is a large city and an important point on the railroad. Des Moines, located 140 miles east of Omaha and 188 miles west of Silvis, is also a large city and an important junction point of the railroad. Rock Island and Moline, in Illinois, and Davenport and Bettendorf, in Iowa, are practically adjacent, being separated by the Mississippi River. East Moline is contiguous to Moline. The aggregate population of those five points is approximately 160,000. All five points will be considered herein as a single area and referred to as the Tri-Cities.

As already indicated Transit in seeking authority for the purchase from White of the operating right over this route stressed its desire to coordinate future motor operations with the railroad's train service for the purpose of improving the latter and agreed to abandon any right which White might have to serve nonrail points. Examination of the record shows that the plan of coordination was substantially identical with that subsequently considered by us in the *Kansas City Southern* case. There are no special circumstances dictating an exception to the application of the principles previously discussed, and we accordingly conclude that Transit's right to operate over the considered route should now be made subject to the conditions or limitations imposed in the latter case to insure that future operations under the motor-carrier operating rights there involved should be limited to those auxiliary to, or supplemental of, train service. Although the subject of key points was not specifically dealt with in the present record it may

626 be taken as certain that less-than-carload traffic from and to intermediate way points is set out at or picked up by through freight trains at Omaha, Des Moines, and the Tri-Cities. These points will be designated as key points in connection with the operations involved in this proceeding and also those involved in No. MC-F-2327. The fact that neither Davenport nor Des Moines is located on the routes involved in the latter proceeding does not preclude the naming of them as key points in connection with operations over the routes. *Rock Island Motor Transit Extension—Trenton, Mo.*, 43 M. C. C. 470. Experience may demonstrate that additional or different key points should be designated in connection with these operations (as for example a key point beyond Omaha or Silvis) for the purpose of preventing unduly long all-motor hauls. If so necessary changes can be made, under the power reserved by condition 5, either on petition of any interested party or on our own motion

Upon reconsideration we find that the certificate heretofore issued to The Rock Island Motor Transit Company in No. MC-29130, to the extent it embraces the motor common carrier operating rights acquired by the transaction authorized and approved in No. MC-F-445 should be modified so as to require that all future operations thereunder be conducted subject to the following conditions and restrictions:

1. The service to be performed by The Rock Island Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Railway.

2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on a rail line of the Railway.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between The Rock Island Motor Transit Company and the Railway shall be reported to use and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

We further find that operation by The Rock Island Motor Transit Company under the certificate to be issued representing the operating rights acquired by the transaction authorized and approved in No. MC-F-2327 should also be made subject to the conditions and restrictions set forth in the preceding finding.

An appropriate order will be entered.

627 COMMISSIONERS ALLDREDGE and PATTERSON concur in the result.

PORTER and MAHAFFIE, *Commissioners*, dissenting:

We concur in Commissioner Miller's separate expression, except the suggestion that authority, in the future, be limited to traffic which moves at rail rates and on rail billing. We do not agree with this because when there is a difference between motor-carrier rates and rail rates, this limitation

would tend to aggravate differences between those motor carriers which are subsidiaries of railroads and those which are not. In our opinion, limiting the service to rail points or points within a reasonable distance of those served by railroad, would be sufficient.

MILLER, *Commissioner*, dissenting:

Eight years ago we approved and authorized the purchase by Transit of operating rights of White Line, then claimed under the "grandfather" clause. In doing so, we found that Transit proposed to render, under the acquired rights, an all-truck service between points also served by the trains of its parent railroad as well as a truck service coordinated with that train service. There is nothing in that report limiting the operating rights to be acquired to prevent such service being rendered. That transaction was consummated and a certificate was eventually issued to Transit covering the rights, also without restriction as to the kind of service authorized. For 8 years Transit has rendered motor-carrier service under those rights, without question that it was rendering the lawfully authorized service. Without affording Transit an opportunity for hearing on the question, the majority now deprive Transit of its rights to continue to render the kind of service which it has been rendering by imposing restrictions like those imposed in *Kansas City S. Transport Co. Inc., Com. Car. Application*, 10 M. C. C. 221; 28 M. C. C. 5, a proceeding arising under section 207 of the act, including a condition limiting the service authorized to that which is auxiliary to, or supplemental of, train service of the parent railroad. The majority report leaves no doubt that this restriction is intended to deprive Transit of the right to engage in operations unconnected with the rail service, of the right to be a party to tariffs containing all-motor or joint rates, and of the right to transport freight at other than the rail rates of its parent. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943. The majority take similar action in respect of operating rights purchased by Transit from the Fredericksens pursuant to our approval, which was also granted without any condition being imposed limiting the kind of service authorized under the rights upon exercise of the purchase authority. The action of the majority, in my opinion, is arbitrary, is wholly unsupported by anything in these records, is without knowledge of the remaining available service, and is unfair to the carrier which invested its

funds in these properties pursuant to our prior approval of its unrestricted operations under the rights acquired.

The justification given by the majority for the action taken is not convincing. The long quotations from the *Barker* case embrace a general discussion of the manner in which a motor-carrier subsidiary of a railroad may coordinate its operations with the train service. However, the only conditions imposed in that proceeding affecting service under the rights authorized to be acquired were the two which canceled so much of those rights as authorized operations in territory outside the natural territory of the parent railroad. Those conditions had nothing to do with the *kind of service* to be rendered. That transaction was consummated, a certificate was issued to the vendee as successor under the "grandfather" clause, without any restriction whatsoever as to the kind of service authorized under the rights, and vendee presumably has conducted an unrestricted all-motor service as authorized by that certificate. Even in the discussion in those quotations from the *Barker* case, there is nothing to indicate that the view of auxiliary and supplementary service then held was of a service limited to the transportation of rail freight at rail rates. The phrase was not so specifically interpreted until 6 years later in the *Texas & Pacific* case. In not a single rail-motor acquisition case decided after the *Barker* case, was any condition precedent to approval imposed which modified the acquired rights to prevent the rendition of all-motor service by the railroad subsidiary until the report of the Commission, division 4, in *Southern Pac. Transport Co.—Purchase—Trinity M. Frt. Lines*, 40 M. C. C. 215, decided June 13, 1945, where, under the facts there existing, a condition precedent was imposed, modifying the rights to limit the service authorized solely to that which was auxiliary to, or supplemental of, train service within the meaning of the *Texas & Pacific* case. Indeed, on two occasions after the decision in the *Kansas City Southern* case, on petitions for reconsideration by protestants in rail-motor acquisition cases, based on the contention that the rights acquired should be restricted in a manner similar to the restrictions in the *Kansas City Southern* case, the Commission denied the petition, thus affirming the action of division 4 in refusing to restrict the rights in that way. *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, and *Southwestern Transp. Co.—Purchase—Hill and Howe*, 37 M. C. C. 83.

The majority correctly point out that, from the date of the decision in the *Barker* case, the principles, there recog-

nized and applied controlled the disposition of every rail-motor acquisition case. The point is, however, that neither in the *Barker* case nor those which followed it was any condition to approval imposed which canceled any of the acquired operating rights so far as the *kind of service* 629 authorized was concerned. Contrary to the view of the majority that the report in *Frisco Transp. Co.—Purchase—Reddish, supra*, marked a departure from former policy, evidenced by the *Barker* case, that report is wholly in line with the report in the *Barker* case. In both cases the only conditions imposed with respect to the rights were geographical. The majority state:

Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only territorially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied.

The carriers and the public generally should not be forced to read into our reports intentions which are not clearly stated therein, or to anticipate that, years after we have given our approval without stating what we mean, we then, on our own motion, and without a hearing, cancel certain of the rights previously authorized to be acquired—on the ground that such was our intention when we first granted the authority. This applies equally to those cases wherein a condition was imposed reserving the power to impose future conditions as well as those where no such power was reserved. That condition, when used, referred vaguely to imposition of future restrictions to limit the service to that which was "auxiliary to, or supplemental of," train service. At the time that condition was imposed the carriers had no reason to anticipate, from anything stated in the reports, that such power might, at some distant future date, take the form of depriving it of the right to haul all traffic except that of the parent railroad, should they exercise the authority granted. Particularly is this true when, even after the decision in the *Kansas City Southern* case, the Commission continued to refrain in every case from imposing conditions in acquisition cases limiting the kind of service in any way under the acquired rights. "Auxiliary and supplemental" had never been stated in any acquisition case, to mean a service limited to that of transporting freight of and for the parent railroad, until the single recent case above cited.

We have permitted these carriers to invest their funds in acquiring definite operating rights, unrestricted as to the kind of service authorized. The "transactions," approved under section 213 or section 5, have been consummated and there is here no longer any question of the transactions being "consistent with the public interest" or that they would "enable such carrier to use service by motor vehicle to public advantage in its operations". Those issues were fully determined in the prior reports when the applications were granted. Those findings were made on the basis of rendition of all motor service as well as a coordinated 630 service. The majority now cancel certain of the rights permitted to be acquired under those findings. No attempt is made, in taking this action, to meet the requirements of section 212 (a).

It is my view that, for the future, motor-carrier subsidiaries of railroads should not be permitted, in section 5 proceedings, to acquire and to engage in unrestricted all-motor operations unconnected with the train service of their parent railroad. It is entirely proper, and, I believe, necessary in the public interest, that when we permit railroads to acquire control of motor-carrier operations under section 5, appropriate conditions precedent to the exercise of the authority should ordinarily be imposed modifying the operating rights and the kind of service authorized under the rights in such a way as to prevent the motor-carrier subsidiary from engaging in all-truck service competitive with independent motor carriers. It seems to me that the imposition of a condition precedent which would require the motor-carrier subsidiary to engage only in the transportation of freight from or to stations on the line of the parent railroad, at rail rates and on rail billing, generally would suffice for this purpose. No such condition was imposed in these proceedings and we should not now, long after exercise of the authority previously granted, arbitrarily cancel certain of the operating rights permitted to be acquired, on the theory that we intended to do it at the time we approved the transactions.

## APPENDIX

Docket No.	Points	Conditions
MC-F-445: 5 M. C. C. 451..... 15 M. C. C. 763.....	Omaha-Silvis, Ill. Off- route points: Cedar Ra- pids, Muscatine, Betten- dorf, and Oxford, Ia.	2 and 5-A.
MC-29130: No report.....		
MC-29130 (Sub-No. 1): 33 M. C. C. 349..... 42 M. C. C. 359.....	Des Moines-Eldon..... Muscatine-Eldon .....	1, 2, 3-A, 4, and 5.
MC-29130 (Sub-No. 2): 33 M. C. C. 349.....	Silvis-Chicago .....	1, 2, 4, and 5.
MC-29130 (Sub-No. 9): 29 M. C. C. 695..... 31 M. C. C. 643.....	Iowa City-Wellman...	None. Unrestricted service proposed and justified. Only two points served.
MC-29130 (Sub-No. 26): 42 M. C. C. 856.....	Guthrie Center branch. Alternate route Entry into Des Moines.	1, 2, 4, and 5.
MC-F-1305: 36 M. C. C. 469.....	Clinton-Davenport-Mus- catine .....	None.
MC-F-1327: 36 M. C. C. 469.....	Audubon branch, Omaha- Griswold .....	None.
MC-F-701: 25 M. C. C. 87.....	Des Moines-Kansas City. No service at intermed- iate points in Iowa ex- cept Indianola.	2 and 5-A.
MC-29130 (Sub-No. 14): No report.....		
MC-F-468: 5 M. C. C. 629.....	Des Moines-Minneapolis	5-A.
MC-29130 (Sub-No. 16): 29 M. C. C. 841.....	Des Moines-Colo., Iowa. Alternate for part of preceding route already restricted.	None specifically but 5-A indirectly.
MC-F-1928: 39 M. C. C. 20.....	Omaha-Lincoln and West	2.
MC-F-2327: 39 M. C. C. 824.....	Omaha-Harlan, Avoca- Atlantic—one-way loop route.	None.

## Conditions

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the rail service of the railroad.

2. Rock Island Motor Transit Company shall not render service from or to, or interchange traffic at, any point other than a station on the lines of the railroad.

3. Shipments transported by applicant shall be limited to those which it receives from or delivers to the railway under

a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

3-A. No shipments shall be transported by applicant between any of the following points, or through or to or from more than one of said points: LaSalle, Peoria, and Rock Island, Ill., and Des Moines, Ottumwa, and Muscatine, Iowa. (Des Moines, Ottumwa, and Muscatine were later eliminated as key points, 42 M. C. C. 359.)

4. All contractual arrangements between applicant and the railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation by motor vehicle to service which is auxiliary to, or supplemental of, the rail service of the railroad.

5-A. The authority herein granted shall be subject to such further limitations, restrictions, or modifications as the Commission may find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition.

632

*Order*

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March, A. D. 1946.

No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY (JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

No. MC-29130

(Formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT CO., COMMON CARRIER

## APPLICATION

*It appearing*, That by reports, 5 M. C. C. 451, and 15 M. C. C. 763, and orders of April 1, 1938, and April 17,

1939, in No. MC-F-445, and by a report, 39 M. C. C. 824, and order of November 28, 1944, in No. MC-F-2327, the Commission, divisions 5 and 4, respectively, authorized The Rock Island Motor Transit Company to acquire by purchases, which have been consummated, certain operating rights as a common carrier by motor vehicle;

*It further appearing*, That by an order of February 5, 1945, the above-entitled proceedings were reopened for reconsideration on the present records solely to determine the conditions or restrictions, if any, which should be imposed to insure that the motor carrier service performed by The Rock Island Motor Transit Company pursuant to authority so acquired should be limited to service which is auxiliary to, or supplemental of rail service;

*And it further appearing*, That such reconsideration has been given and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the prior reports and orders of April 1, 1938, April 17, 1939, and November 28, 1944, in these proceedings are hereby referred to and made a part hereof:

633 *It is ordered*, That the certificate heretofore issued in No. MC-29130, to the extent it embraces the operating rights acquired by the transaction approved and authorized in No. MC-F-445, shall be modified, and that the certificate to be issued representing the operating rights, acquired by the transaction approved and authorized in No. MC-F-2327 shall be framed, so as to make the motor common carrier operations authorized thereby subject to the conditions and restrictions set forth in the findings of the said report on reconsideration.

By the Commission.

(SEAL)

W. P. BARTEL,  
W. P. Bartel,  
Secretary.

636

Jul-3 '47 708230

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

Joseph B. Fleming and Aaron Colnon, Trustees  
 La Salle Street Station  
 Law Department

M. L. Cassell, Jr.,  
 General Attorney.

Chicago 5, Ill.  
 June 30, 1947

Re: MC-F 445 The Rock Island Motor Transit Company—  
 Purchase—White Line Motor Freight Company, In-  
 corporated, *et al.*

-----  
 Hon. W. P. Bartel, Secretary  
 Interstate Commerce Commission  
 Washington 25, D. C.

Dear Sir:

Preserving its special appearance as made in its petition for reconsideration and oral argument, dated May 23, 1946, the petitioner desires to point out to the Commission that while its order of June 9, 1947, in the above captioned matter, states: " \* \* \* to the extent that it (the petition of May 23, 1946) seeks reopening of the proceedings, the said petition be and it is hereby granted and the proceedings be, and they are hereby reopened for further hearing \* \* \* for the purpose of determining what conditions if any appear necessary and proper should be imposed \* \* \* " petitioner made no request for a reopening. On the contrary it was and is the position of petitioner, as stated in its petition of May 23, 1946, that the Commission is without jurisdiction to reopen the proceedings and without jurisdiction to impose any condition whatsoever not contained in the original orders and certificates.

The request of the petition of May 23, 1946, was that the Commission "reconsider the aforesaid report and order (the Commission's order of March 4, 1946) and upon such reconsideration to vacate and withdraw the said report and order of March 4, 1946 \* \* \* ."

Yours very truly,

M. L. CASSELL, JR.  
 M. L. Cassell, Jr.

MLC:md

July 9, 1947

No. MC-F-445

Refer: P-708230

Mr. M. I. Cassell, Jr., General Counsel, Law Dept.,  
The Chicago, Rock Island and Pacific Railway Company,  
La Salle Street Station,  
Chicago 5, Illinois

Dear Mr. Cassell:

Receipt is acknowledged of your letter of June 30th, referring to the order of the Commission of June 9, 1947, reopening the above-numbered proceeding, entitled The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Incorporated, *et al.*, for further hearing and calling attention to the position of applicants that the Commission is without jurisdiction to reopen the proceedings and without jurisdiction to impose any conditions not contained in the original order.

Very truly yours,

W. Y. BLANNING, *Director.*

IJR:mgb

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### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of June, A. D. 1947.

No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

No. MC-29130

(formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT CO., COMMON CARRIER  
APPLICATION

Upon consideration of the record in the above-entitled proceedings, and of a petition of The Rock Island Motor

Transit Company, dated May 23, 1946, for reconsideration of the Commission's report and order of March 4, 1946, 40 M. C. C. 457; and good cause therefor appearing:

*It is ordered, That, to the extent it seeks reopening of the proceedings, the said petition be, and it is hereby, granted, and the proceedings be, and they are hereby, reopened for further hearing, at a time and place hereafter to be fixed, for the purpose of determining what conditions, if any appears necessary and proper, should be imposed to limit the service of The Rock Island Motor Transit Company, under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451) and November 28, 1944 (39 M. C. C. 824), in Nos. MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to, or supplemental of, the rail service of The Chicago, Rock Island, and Pacific Railway Company.*

By the Commission.

W. P. BARTEL,  
*Secretary.*

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INTERSTATE COMMERCE COMMISSION  
Washington, D. C.

September 10, 1947

No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL: THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

No. MC-29130  
(formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT CO., COMMON CARRIER  
APPLICATION

The above-entitled proceedings are assigned for further hearing on October 9, 1947, at 9:30 o'clock a. m., United States Standard Time, on the 19th Floor, Illinois Commerce Commission, 160 N. La Salle Street, Chicago, Illinois, be-

fore Examiner James L. Smith, for the purpose of determining what conditions, if any appears necessary and proper, should be imposed to limit the service of The Rock Island Motor Transit Company, under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451) and November 28, 1944 (39 M. C. C. 824), in Nos. MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to, or supplemental of, the rail service of The Chicago, Rock Island, and Pacific Railway Company.

Any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service hereof, the date of mailing of this notice to be considered as the time when said notice is served.

W. P. BARTEL,  
*Secretary.*

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Before the  
INTERSTATE COMMERCE COMMISSION  
No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY, INCORPORATED, ET AL.

No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY  
(JOSEPH B. FLEMING AND AARON COLNOR, TRUSTEES)—  
CONTROL; THE ROCK ISLAND MOTOR TRANSIT COMPANY—  
PURCHASE—J. H. FREDERICKSON AND D. H. FREDERICKSON

No. MC-29130  
(Formerly MC-49147)

THE ROCK ISLAND MOTOR TRANSIT COMPANY, COMMON  
CARRIER APPLICATION

*Motion for Vacation or Rescission of Order Reopening  
Proceeding and for Discontinuance of Proceeding  
Pursuant Thereto—Filed Oct. 3, 1947*

642 Rock Island Motor Transit Company, certificate  
holder in the above entitled proceeding, hereby en-  
tering its special appearance for the sole purpose of

objecting to the exercise of jurisdiction in the respects hereinafter set forth and preserving its special appearance as made by it in its Petition for Reconsideration and Oral Argument, dated May 23, 1946, respectfully moves that the Commission vacate or rescind its orders of June 9, 1947 and September 10, 1947, reopening the proceedings for further hearing for the stated purpose of determining what conditions, if any appear necessary and proper, should be imposed to limit the service of the Rock Island Motor

Transit Company under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451) and November 28, 1944 (39 M. C. C. 824) in Nos. MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to or supplemental of the rail service of The Chicago, Rock Island and Pacific Railway Company, and as ground for its motion, petitioner alleges and respectfully submits that the purpose for which the proceeding is reopened and the hearing set as defined in said order, is a purpose which is beyond the power of the Commission in that no fraud or misrepresentation or failure to disclose any pertinent facts in connection with the application, for transfer or issuance of the certificates in question, or other lawful reason, existed or is alleged; and since no objection was made to the scope or form of the said orders during the period before they became effective, and since said orders and the certificates in question have been in effect these many years last past, the certificates and orders are not now subject to any modification which will alter, restrict, limit, reduce, withdraw or annul the operating rights which were granted thereby. In support of its motion, petitioner respectfully shows:

That the Commission issued its order as of March 4, 1946, in the matter of the Rock Island Motor Transit Company—Purchase—White Line Freight Company, Inc., *et al.*, Docket MC-F-445 and related matters;

That under date of May 23, 1946, petitioner by special appearance filed its petition for "Petition for Reconsideration and Oral Argument" as to said order decided as of March 4, 1946, as set forth in Exhibit A, attached hereto and made a part hereof;

That said petition of May 23, 1946, set forth pertinent facts in regard thereto and statements of law and arguments in support of said petition; that said argument, statements, citations of law and other matters, as contained

therein, are not set forth herein but the Commission is respectfully referred thereto;

That one of the cases cited by petitioner in said argument of May 23, 1946, was *Seatrain Lines v. United States*, 64 Fed. Supp. 156; that said Seatrain case was appealed to the Supreme Court of the United States and on January 6, 1947, that Court handed down its decision affirming the decision of the United States District Court to the effect that certificates once issued are inviolate and that under date of February 10, 1947, petitioners by informal communication called this Commission's attention to said decision of the United States Supreme Court in affirming the said Seatrain decision which petitioner had theretofore cited in support of its Petition for Reconsideration and Oral Argument, and attached a copy of said Supreme Court's opinion for the convenience and guidance of the Commission;

That thereafter on the 9th day of June, 1947, this Commission issued its order, to which this motion is addressed, reopening said proceedings and stating: "Upon consideration of the recommendation in the above entitled proceeding and of a petition of the Rock Island Motor  
645 Transit Company, dated May 23, 1946, for reconsideration of the Commission's report and order of March 4, 1946, 40 M. C. C. 457; and good cause therefor, appearing:

*It is ordered*, That, to the extent it seeks reopening, the petition be, and it is hereby, granted, and the proceedings be, and they are hereby, reopened for further hearing, at a time and place hereafter to be fixed \* \* \*."

That upon receipt of said order of June 9, 1947, this petitioner addressed an informal communication to the Commission which pointed out that said order of June 9, 1947, was in error insofar as it purported to be based on any request of petitioner for reopening, for, on the contrary, petitioner had, in its petition of May 23, 1946, denied the power and authority of the Commission to reopen and had asserted that it was without jurisdiction whatsoever to impose any conditions or restrictions whatsoever not contained in the original orders and certificates, all as shown by Exhibit B, attached hereto and made a part hereof;

That despite petitioner's objections and remonstrances that it had not requested reopening but, on the contrary,

denied the Commission's jurisdiction so to do, the Commission entered its order of September 10, 1947, setting the above proceedings for further hearing on October 9, 1947, at 9:30 a. m. United States Central Standard Time, on the 19th Floor of the Illinois Commerce Commission, 160 North LaSalle Street, Chicago, Illinois, before Examiner James L. Smith, for the stated purpose of determining what conditions, if any appear necessary and  
 646 proper, should be imposed to limit the service of the Rock Island Motor Transit Company under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451) and November 28, 1944, (39 M. C. C. 824) in Nos. MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to or supplemental of the rail service of The Chicago, Rock Island and Pacific Railway Company.

WHEREFORE, Petitioner prays that this Commission's orders of June 9, 1947 and September 10, 1947, reopening these proceedings and assigning them for hearing, be vacated and rescinded, and that further proceedings pursuant to such orders be discontinued and terminated, and that upon such vacation and rescission as aforesaid, this Commission will consider petitioner's Petition for Reconsideration and Oral Argument, dated May 23, 1946, and upon consideration thereof, will withdraw and vacate the same leaving inviolate its previous orders and the rights thereunder as heretofore granted and accorded, and as accepted and acted upon by the Rock Island Motor Transit Company and heretofore recognized by the Commission, and that pending determination of this motion and the petition heretofore made, the Commission defer any further proceedings pursuant to said orders of June 9, 1947, and September 10, 1947.

Respectfully submitted,

HARRY E. BOE,  
 MARTIN L. CASSELL, JR.,  
 A. B. HOWLAND,  
*Attorneys for Petitioner.*

139 W. Van Buren Street  
 Chicago 5, Illinois

October 1, 1947.

646A

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof, properly addressed, to each other party.

Dated at Chicago, Illinois, this 1st day of October, 1947.

MARTIN L. CASSELL, JR.

139 W. Van Buren Street  
Chicago 5, Illinois

649 Before the Interstate Commerce Commission

Docket No. MC-F-445

THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—  
WHITE LINE MOTOR FREIGHT COMPANY,  
INCORPORATED, ET AL.

Docket No. MC-F-2327

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
(JOSEPH B. FLEMING and AARON COLNOR, Trustees—Control) THE ROCK ISLAND MOTOR TRANSIT COMPANY—PURCHASE—J. H. FREDERICKSON and D. H. FREDERICKSON

Docket No. MC-29130  
(Formerly No. MC-49147)

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
Common Carrier Application

Room 23, Illinois Commerce Commission,  
169 North La Salle Street,  
Chicago, Illinois,

Thursday, October 9, 1947.

Met, pursuant to notice, at 9:30 a. m.

• Before: JAMES L. SMITH, *Examiner*.

APPEARANCES:

(As heretofore noted.)

ADDITIONAL APPEARANCES:

650 Jack Garrett Scott, 839 Seventeenth Street, N. W.,  
Washington, D. C., appearing for Regular Common  
Carrier Conference of American Trucking Association, Inc., intervener.

David Axelrod, 39 South La Salle Street, Chicago 3, Illinois, appearing for Dohrn Transfer Company and Rock Island Transfer and Storage Company, interveners.

Franklin R. Overmyer, 111 West Monroe Street, Chicago, Illinois, appearing for Carstensen Freight Lines, Inc., intervener.

651

## PROCEEDINGS

Exam. SMITH: Please come to order, gentlemen.

The Interstate Commerce Commission has assigned for further hearing at this time Docket No. MC-F-445, entitled The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Incorporated, *et al.*; number MC-F-2327, entitled The Chicago Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees) Control: The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, No. MC-29130, formerly number MC-49147, entitled The Rock Island Motor Transit Company, common carrier application.

These proceedings have been assigned for further hearing for the purpose of determining what conditions, if any, appear necessary and properly should be imposed to limit the service of the Rock Island Motor Transit Company, under the operating rights acquired by it pursuant to authority granted by reports and orders of April 1, 1938 (5 M. C. C. 451) and November 28, 1944 (39 M. C. C. 824), in numbers MC-F-445 and MC-F-2327, respectively, to service which is auxiliary to, or supplemental of, the rail service of the Chicago, Rock Island and Pacific Railway Company.

These proceedings will all be heard at this time on a consolidated record.

It is one of the Commission's rules, gentlemen, 651A that there will be no smoking in the hearing room.

I will ask for additional appearances at this time. Anyone who has entered an appearance previously need not enter an appearance at this time, and in entering your appearance give your name, your business address, for whom you are appearing and state whether or not you are a member of the Commission's bar.

Mr. Scott: Jack Garrett Scott, 839 Seventeenth Street, N. W., Washington, D. C., appearing for Regular Common Carrier Conference of the American Trucking Association, Inc. I am an attorney and am a member of the Commission's Bar.

Mr. AXELROD: I don't think my appearance is in this proceeding. It is in a number of so-called related proceedings. David Axelrod, 39 South La Salle Street, Chicago 3. Appearing for Dohrn Transfer Company. I am an attorney and licensed to practice before the Commission.

Exam. SMITH: Are there any other appearances?

Mr. OVERMYER: Franklin R. Overmyer, 111 West Monroe Street, Chicago. I am an attorney and registered practitioner and appear on behalf of Carstensen Freight Lines.

Exam. SMITH: In what capacity do you appear now, Mr. Overmyer?

Mr. OVERMYER: Interveners as our interests may appear.

Exam. SMITH: And Mr. Axelrod?

Mr. AXELROD: The same, and may I add to my 652 appearance, the appearance of the Rock Island Transfer and Storage Company, please, and I will put it on the written appearance blank.

Exam. SMITH: Mr. Scott?

Mr. SCOTT: My appearance is for the Regular Common Carrier Association, which has intervened previously in this proceeding.

Exam. SMITH: These dockets cover the acquisition by the Rock Island Motor Transit Company in number MC-F-445 of the operating rights of White Line Motor Freight Company, Incorporated, which was approved April 1, 1938 and consummated April 5, 1938, covering operations between Silvis, Illinois and Omaha, Nebraska via Des Moines, Iowa, and in F-2327 covering the acquisition of the operating rights of the Frederickson Company, which was approved November 28, 1944, and consummated January 22, 1945, covering operations between Atlantic, Iowa and Omaha, Nebraska.

In this proceeding, today, I would like, if we could, to develop the records first to show, first, the manner in which the Rock Island Railroad distributed its LCL freight prior to the acquisition of White Line on April 5, 1938 and, two, the manner in which the Rock Island Railroad distributed its LCL freight after April 5, 1938, and three, the effect the purchase by Rock Island Transit of White Line has had on independent motor carriers, and four, the effect the imposition of the conditions set forth in the report on re-

653 consideration of March 4, 1946 would have on the Rock Island Railroad, the Rock Island Motor Transit, on other motor carriers and on the public.

*Statement by Mr. Cassell*

Now, Mr. Cassell, if you have a statement to make you may.

Mr. CASSELL: Yes, sir, if I may, please.

May it please the Commission, I am here, as is Mr. Boe, who accompanies me, both of us, pursuant to a special appearance. We wish to clearly make of record that ours is not a general appearance, but that we appear especially for the sole purpose of contending the jurisdiction and authority of the Commission to conduct the hearing that is set before the Examiner today and our office is room 1025, 139 West Van Buren Street, Chicago, and in that regard, I wish to renew the motion to vacate and for repression of the reopening as tendered to the Commission under date of October 1, and in support of that motion I tender an affidavit, a statement, which merely recites the facts of the acquisition of both the Frederickson and the White Line routes. The affidavit states the date of the applications being filed and the dates of the orders, the dates of consummation, the filing of the tariffs and the approval of the transaction in so far as the entry of the journal entries in the books of the parent companies are concerned.

All of these facts, of course, appear from the Commission's record or file.

654 Exam. SMITH: We will receive the affidavit.

Mr. CASSELL: I should also like to ask the Examiner at this time as to under what section of the act this proceeding is being conducted?

Exam. SMITH: I was going just by the order dated September 10, 1947, assigning these matters for hearing at this time before me. Right now, frankly, I couldn't tell you what section of the act the matter is assigned under. I have nothing to do with the preparation of the order so I don't know.

Mr. CASSELL: May we please have a statement from the Commission in the record before it is closed as to under which section the proceeding is being conducted, and at the same time I should like to inquire as to whether the Examiner is a so-called Section 11 Examiner under the Administrative Procedure Act?

Exam. SMITH: I can answer that. No.

Mr. CASSELL: You are not?

Exam. SMITH: No.

Mr. CASSELL: Then that becomes material as to under what section the proceeding is being conducted.

Exam. SMITH: I think I can probably say the reason it has been assigned before me is that these are matters which were initiated prior to the passage of the Administrative Procedure Act, and it is my understanding, although  
 655 I don't know definitely, that in matters of that nature they can be assigned to an Examiner who is not a Section 11 Examiner. That is my understanding.

Mr. CASSELL: However, I should like to preserve the point and would like the record to appear under which section the matter is being conducted.

Exam. SMITH: Yes.

Does that complete your statement?

Mr. CASSELL: It does, sir.

Exam. SMITH: With respect to this motion, you say you wanted to renew a motion to vacate?

Mr. CASSELL: That motion has been tendered to the Commission under date of October 1 and the requisite number of copies were furnished to the Commission and served on many interested parties. I don't believe some of the new parties who have entered their appearance for the first time have copies of that. However, all those who have indicated any interest heretofore have been served.

For the benefit of those who are here today for the first time, I will state the prayer of that motion. It recites the circumstances of the order of March 4, 1945, filing of a petition for reconsideration and oral argument pursuant to that order, which petition denied the jurisdiction and power of the Commission to enter the order as it did or to enter  
 656 any other order changing, altering, amending, diminishing the rights of the Motor Transit Company as accorded, it recites the calling of the Commission's attention to the decision of the Supreme Court in the Seatrain case. It recites the issuance of the Commission's order of June 9, 1947, which purports to be at the request of the parties whom I represent and a communication from myself to the Commission reciting that we made no such request, but, on the contrary, vigorously contested the power and authority of the Commission to have any such hearing and recites, again, the order of September 10 of the Commission setting this matter for hearing and then concludes with the following prayer:

"Wherefore petitioners pray that this Commission's orders of June 9, 1947, and September 10, 1947 reopening these proceedings and assigning them for hearing be vacated and rescinded and that further proceedings pur-

suant to such orders be discontinued and terminated, and that upon such vacation and recession as aforesaid, this Commission will consider petitioner's petition for reconsideration and oral argument dated May 23, 1946, and upon consideration, therefore, will withdraw and vacate the same leaving inviolate its reviews, orders and the rights thereunder as heretofore granted and accorded and as accepted and acted upon by the Rock Island Motor Transit Company and heretofore recognized by the Commission, and that pending the termination of this motion and  
 657 the petition heretofore made, the Commission defer any further proceedings pursuant to said orders of June 9, 1947, and September 10, 1947."

I have been advised unofficially, although I have no writing to that effect, and I do not know whether the Examiner knows, that this motion has been overruled. That is merely by hearsay.

Exam. SMITH: I have no official knowledge of it at all.

Mr. CASSELL: It is for that reason, being uncertain as to the status of the motion, that I renew it and present the affidavit at this time.

Mr. SCOTT: Mr. Examiner, it is our information, conveyed to us by Paul Royale, the Chief Examiner of the Bureau, that the motion was denied by the Commission on last Tuesday, the 2nd of October.

Exam. SMITH: I have no knowledge of it.

Mr. CASSELL: Assuming that it is denied, I renew it and present the affidavit. I would like to inquire of the Examiner the significance of the fact that the order of June 9, 1947, purports that the reopening is at the request of petitioners, whereas the order of September 10 contains no such statement. Does this indicate that the Commission, in light of our having advised it that we did not request a hearing but, on the contrary, vigorously contested it, that they accede to the validity of that position and that the order of September 10, is on the Commission's own motion?

658 Exam. SMITH: Well, again, my answer to that would be that I had nothing to do with the preparation of either order and I, therefore, am unable to state the reasons for any changes in the orders that you point out.

Mr. CASSELL: May we please have a statement made of record in this proceeding before the record is closed as to the significance of that change, if we may?

Exam. SMITH: Yes.

Mr. CASSELL: It might be well to inquire, also, of the Examiner, as to what the Commission considers to be the record in the present proceeding? It is our understanding that in light of the order that the record would consist of the application, the order setting it for hearing, the transcript of record, proposed report, all briefs and subsequent orders and communications relating to these proceedings, is that correct, sir?

Exam. SMITH: That would be my understanding, yes.

Mr. CASSELL: Which, in the case of MC-F-445, would begin at the time of the filing of that application in 1937.

Exam. SMITH: It would be October 13, Mr. Cassell.

Mr. CASSELL: And the considering date for the Frederickson case would conclude all orders and communications relating thereto, down to and including the present time.

Exam. SMITH: That would be my understanding, yes.

Mr. CASSELL: I would also like to inquire the significance in the Commission's orders of the recital of the third docket number? You will note that the Commission's orders recite, first, Docket MC-F-445, secondly, Docket MC-F-2327, which relates specifically to the White Line and the Frederickson proceedings, and thirdly, recites No. MC-29130. (Formerly MC-49147.)

Exam. SMITH: Well, I take it that MC-29130 is the docket in which the rights acquired in the White Line case are now incorporated in the certificate issued in MC-29130.

Mr. CASSELL: That is only partially true, Mr. Examiner. That is the general docket number under which all of our certificates are contained. The White Line matter itself contained two docket numbers as the White Line Motor Freight Company, Inc., was under docket 29130, whereas the White Line Trucking Company is under docket 49147. In other words, are the original certificates of our predecessor companies under inquiry at the present time as well as our own certificates?

Exam. SMITH: When you say "predecessor companies" what do you mean?

Mr. CASSELL: The White Line.

Exam. SMITH: Are they under what?

Mr. CASSELL: Inquiry, under investigation or whatever you are doing.

Exam. SMITH: Well, in so far as they are embraced in the two finance cases, it would be my understanding the question is as set out in this order of

September 10 to determine what conditions, if any, appear necessary and proper, should be imposed on those operating lines to limit the service of the service which is auxiliary to or supplemental of the rail service of the Chicago, Rock Island and Pacific Railroad.

All right, then, Mr. Cassell, as I understand now, on behalf of the Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railway Company you don't intend to proceed any further at this time?

Mr. CASSELL: We have nothing further to offer, sir.

Exam. SMITH: You have no witnesses here that you would be willing to offer subject to questioning?

Mr. CASSELL: The Commission has not notified us previously to this session that it desired any particular witnesses produced, and from our own standpoint we are satisfied with our certificates in their present form and have no desire to have them changed.

Exam. SMITH: Well, then, I unders and your answer is that you have no witnesses?

Mr. CASSELL: That is correct, sir. We believe that the records and the certificates as already made are inviolate.

*Statement by Mr. Scott*

Mr. SMITH: Now, Mr. Scott, have you anything that you desire to say at this time.

661 Mr. SCOTT: May it please the Examiner, we have no witnesses present and have no evidence to be introduced in these proceedings. The statement of the position of the Regular Common Carrier Conference, of American Trucking Association in these proceedings is contained, I think, adequately in the petition for leave to intervene filed prior to this time. We are not so much interested in the factual situation as we are in the general principle as to restrictions on the operating authority of motor carriers owned or controlled by rail carriers, and in support of the order heretofore entered by this Commission which announces that principle.

Exam. SMITH: Mr. Axelrod?

*Statement by Mr. Axelrod*

Mr. AXELROD: If the Examiner please, there was a question brought to your attention as to whether or not the record in the proceeding here consisted only of the various docket numbers which were read in the record by Mr. Cassell, and I believe, which you, the Examiner, more or

less confirmed. I think that this record should contain, in addition to that, another record before this Commission in Docket No. MC-C-406, which docket and which record is pending before this Commission on the basis of a complaint case filed by complainant there, Dohrn Transfer Company, against the Rock Island Motor Transit Company, growing out of charged violations of the certificate authority held by the Rock Island Motor Transit Company, which certificate authority in part, is a part of the certificate 661A which the Rock Island Motor Transit Company purchased from the White Line.

Now, as I understand it, as per some of the conversations or statements that have gone into the record up to this point, one of the White Line certificates involved is a certificate from Silvis to Des Moines. I believe you said it was either the Frederickson or—

Exam. SMITH: No, the White Line is covered from Silvis to Omaha, isn't it, Mr. Cassell?

Mr. CASSELL: Yes, sir.

Exam. SMITH: And the Frederickson is from Atlantic—that is in the western part of Iowa—to Omaha.

Mr. AXELROD: In any event, may I point out the position, here, of the Dohrn Transfer Company. The Dohrn Transfer Company in the complaint proceeding which is still pending before this Commission charged that the Rock Island Motor Transit Company was violating its certificate authority in connection with its operations which were being conducted between the point of Peoria, Illinois, and the Tri Cities, or more specifically, Davenport, Iowa, which is the interstate point involved, and in that connection the certificate held by the Rock Island Transit Company, which authorized service from Silvis, Illinois to Davenport, Iowa, would be involved.

That being the situation, I believe that this record should also show the fact that there is presently before this 662 Commission a complaint on file against the Rock Island Motor Transit Company charging the Rock Island Motor Transit Company with operating beyond the scope of its present certificate authority.

May I add, further, that the complaint proceedings has gone to the stage wherein as of February 8, 1945, a recommended report and order was issued by the Joint Board which heard the complaint, recommending that the Rock Island Motor Transit Company cease and desist from violating its certificate in the manner charged by the com-

plainant in that case, and exceptions were duly taken by the Rock Island Motor Transit Company, and the case is now pending on exceptions, and I believe, or I am assuming, at least, that it is pending before the Commission because of the fact that this general question is involved under the investigation or the case which is being called for hearing this morning.

To that extent, I am suggesting and moving that the Commission make part of the record in this case the complaint case now pending before it in Docket No. MC-C-406, and both Mr. Cassell and Mr. Boe were parties to that case as representing the Rock Island Motor Transit Company.

Mr. BOE: We weren't parties to the case. We were representing the parties to the case.

Mr. AXELROD: I beg your pardon, that is right. They represented the Rock Island Motor Transit Company 663 and were parties of record in the case.

Exam. SMITH: Now, as I understand, you make a motion that that complaint case be made a part of these proceedings, also?

Mr. AXELROD: That is correct, Mr. Examiner.

Exam. SMITH: Well, that will be taken under advisement.

Mr. CASSELL: May it please the Examiner, we vigorously contest that. The matter is not germane to the stated purpose of this proceeding, it is wholly unrelated, it is improper and highly prejudicial and in no way should become a part or be considered with whatever may be done or not done in this instant case.

Exam. SMITH: I won't rule on it at this time.

Mr. AXELROD: I don't know whether the Examiner wishes any support of my position in that situation. I can, if he likes, state for the record why I believe the case should be made part of this record.

Exam. SMITH: I don't think it is necessary. Whether it will or will not be made a part is the matter, and you made a motion and he has made a statement with respect to it, and I won't rule on it at this time.

Mr. AXELROD: The record in the case which I refer to, MCC 406, does contain within it evidence with respect to operations by the Rock Island Motor Transit Company under its existing authority to, as we allege, there, the detriment of the complainant in that case, and I 664 understand one of the things which the Examiner indicated might be of value to this proceeding was,

among other things, the effect of the operations of the Rock Island Motor Transit Company upon existing independent truck carriers.

Exam. SMITH: Yes, I had hoped that we could get some information with respect to the past operating history of the Rock Island Motor Transit before and after it had taken over the White Line and the Frederickson operations, but I guess we are not going to get that today.

Now, where is Mr. Overmyer? It seems he has gone. I wish he had informed me before he left.

Well, if we have no witnesses here to ask questions or interrogate, and the Rock Island people are not willing to proceed further, and after hearing the statements of the intervening parties, if there is nothing further I will say that there will not be an Examiner's proposed report, and we will just close the hearing at this time.

(Whereupon, at 10:30 a. m., the hearing in the above-entitled matter was closed.)

## 665 In the Supreme Court of the United States

### *Statement of Points to be Relied on and Designation of Parts of Record Necessary for Consideration Thereof* —Filed April 20, 1950

1. Now comes appellants, United States of America and Interstate Commerce Commission, and for their statement of points upon which they intend to rely in their appeal to this Court, adopt the points contained in their assignment of errors heretofore filed therein.

2. The following parts of the record are necessary for the consideration of the foregoing points. C

A. The record in this cause filed in this Court pursuant to appellants' praecipe, but including only the following parts of Item No. 16 thereof, the record before the Interstate Commerce Commission in Docket MC-F 445, to wit:

1. Application of Rock Island Motor Transit Company, a corporation, for authority to acquire properties and operating rights of White Line Motor Company, Inc., and White Line Trucking Company, a corporation.

2. Exhibit B to application showing nature of transaction, terms and conditions thereof.

3. Exhibit B-1-(a)-1, being draft of agreement between applicant and Lawrence E. Stone of Des Moines,

666 Iowa, setting forth the terms and conditions upon which the proposed sale of the properties and operating rights was made.

4. Exhibit B-2, schedule of the physical property, including equipment acquired.

5. Transcript of Testimony before the Interstate Commerce Commission, held at Chicago, Illinois, on November 19, 1937, pages 1-289.

B. The record in this cause filed in this Court pursuant to appellants' praecipe, but including only the following parts of Item No. 16 thereof, the record before the Interstate Commerce Commission in Docket MC-F 2327, to wit:

1. Transcript of Testimony before the Interstate Commerce Commission, held at Omaha, Nebraska, November 17, 1943, pages 1-120.

C. The record in this cause filed in this Court pursuant to appellants' praecipe, but including only the following parts of Item 16 thereof, the record before the Interstate Commerce Commission in Dockets MC-F 445, MC-F 2327, and MC-29130, to wit:

1. Order of the Interstate Commerce Commission entered at its office in Washington, D. C., on the 9th day of June, 1947, MC-F 445, The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Inc., *et al.*; MC-F 2327, The Chicago, Rock Island & Pacific Railway Company—Control—The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson; and MC-29130 (formerly MC-49147) The Rock Island Motor Transit Company—Common Carrier Application.

2. MC-F-445, MC-F-2327, and MC-29130, Notice of the Interstate Commerce Commission September 10, 1947, Assigning Hearing.

3. Transcript of Testimony, Docket MC-F-445, MC-F-2327 and MC-29130, pages 290-307.

667 Appellants designate the foregoing specified parts of the record for printing by the Clerk of this Court.

PHILIP B. PERLMAN

Philip B. Perlman

*Solicitor General*

DANIEL W. KNOWLTON

Daniel W. Knowlton

*Chief Counsel*

*Interstate Commerce Commission*

668

## CERTIFICATE OF SERVICE

I hereby certify that I served the attached Statement of Points to be Relied on and Designation of Parts of Record Necessary for Consideration Thereof upon appellee herein by mailing on April 17, 1950, a copy thereof to the following persons, its attorneys:

HARRY E. BOE, Esq.

*General Counsel*

1025 LaSalle Street Station  
Chicago, Illinois

A. REA WILLIAMS, Esq.

Investment Building, N. W.  
Washington, D. C.

GEORGE COSSON, JR., Esq.

State Capitol  
Des Moines, Iowa

ROBERT H. HEINECAMP, Esq.

Omaha Chamber of Commerce  
Omaha, Nebraska

HENRY E. SASSO, Esq.

77 W. Washington St.  
Chicago, Illinois

WILLIAM D. McFARLANE

William D. McFarlane

*Special Assistant to the Attorney General*

April 17, 1950

669

(File Endorsement Omitted)

670

In the Supreme Court of the United States

*Designation by Appellee of Additional Parts of Record  
Which it Thinks Material—Filed May 11, 1950*

Now comes Appellee, The Rock Island Motor Transit Company, and designates the following parts of the record which are additional to those designated by the Appellants, and which Appellee believes to be material in the determination of this cause:

1. Report and order recommended by Examiner John S. Higgins, served February 12, 1938 in Docket MC-F-445.

The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, *et al.*, recommending approval of purchase, subject to restrictions. (Item 5, Exhibit 1.)

2. Exceptions to proposed report, filed March 3, 1938, by applicant, The Rock Island Motor Transit Company. (Included in Item 6, Exhibit 1.)

3. Report and order of the Commission by Division 5, Commissioners Eastman, Lee and Rogers, filed and entered April 1, 1938, in Docket MC-F-445, The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Inc., *et al.*, approving transaction, subject to restrictions. (Item 7, Exhibit 1.)

4. Letter dated at Chicago, Illinois, April 2, 1938, addressed to Honorable W. Y. Blanning, Director, 671 Bureau of Motor Carriers, Interstate Commerce Commission, signed The Rock Island Motor Transit Company by Harry E. Boe, its attorney, advising of transfer of the physical properties and operating rights of White Line Motor Freight Company, Inc. as of April 5, 1938. (Included in Item 8, Exhibit 1.)

5. Carbon copy of letter dated April 11, 1938, addressed to Harry E. Boe, Attorney, The Rock Island Motor Transit Company, Chicago, Illinois, signed by W. Y. Blanning, Director, Bureau of Motor Carriers, Interstate Commerce Commission, acknowledging receipt of letter of April 2, 1938. (Included in Item 8, Exhibit 1.)

6. Carbon copy of letter dated August 22, 1938, addressed to Harry E. Boe, Attorney, The Rock Island Motor Transit Company, Chicago, Illinois, signed by W. Y. Blanning, Director, Bureau of Motor Carriers, Interstate Commerce Commission, approving journal entries covering acquisition of White Line Motor Freight Company, Inc., *et al.* (Included in Item 8, Exhibit 1.)

7. Order of the Commission entered July 21, 1936, and attached Special Circular M No. 1 in regard to adopting tariffs of predecessor on transfer of ownership. (Included in Item 9, Exhibit 1.)

8. Order of the Commission entered September 29, 1938, and attached amendment No. 1 to Special Circular M No. 1 in regard to adopting tariffs of predecessor on transfer of ownership. (Included in Item 9, Exhibit 1.)

9. Order of the Commission entered April 30, 1940, and attached amendment No. 2 to Special Circular M No. 1 in regard to adopting tariffs of predecessor on transfer of ownership. (Included in Item 9, Exhibit 1.)

10. Carbon copy of letter dated September 21, 1939, addressed to M. B. Sherer, Business Manager, Mid-Western Motor Freight Tariff Bureau, Kansas City, Missouri, signed by W. Y. Blanning, Director, Bureau of Motor Carriers, Interstate Commerce Commission, in regard to the adoption of the White Line tariffs by William E. Bell, dba Midway Transit Company; and The Rock Island Motor Transit Company. (Item 10, Exhibit 1.)

672 11. Carbon copy of letter dated February 23, 1945, addressed to The Rock Island Motor Transit Company, signed by Walter T. Hayes, Assistant Director, Bureau of Traffic, Interstate Commerce Commission, issuing instructions in regard to the adopting of the common carrier tariffs of Roland H. Kinney, dba Mohawk Freight Lines, and having attached specimen copy of adoption notice. (Included in Item 11, Exhibit 1.)

12. Carbon copy of letter dated March 30, 1945, addressed to The Rock Island Motor Transit Company, Walter Hitchen, General Freight Agent, signed by Walter T. Hayes, Assistant Director, Bureau of Traffic, Interstate Commerce Commission, stating that previous instructions in letter of February 23, 1945 were in error and that adoption notices received March 5, 1945, providing for the adoption of tariffs, etc., of Roland H. Kinney (dba Mohawk Freight Lines) and W. A. and M. K. Remmers (dba Remmers Truck Line) are rejected and returned. (Included in Item 11, Exhibit 1.)

13. Letter of April 3, 1945, addressed to Walter T. Hayes, Assistant Director, Bureau of Traffic, Interstate Commerce Commission, signed by Martin L. Cassell, Jr., acknowledging Hayes' letter of March 30th and requesting withdrawal of rejection and acceptance of motor common carrier tariffs theretofore filed. (Included in Item 11, Exhibit 1.)

14. Carbon copy of letter dated April 11, 1945, addressed to The Chicago, Rock Island and Pacific Railway Company, Martin L. Cassell, Jr., signed by Walter T. Hayes, Assistant Director, Bureau of Traffic, Interstate Commerce Commission, reaffirming rejection of adoption notices above referred to. (Included in Item 11, Exhibit 1.)

15. Adoption notices of The Rock Island Motor Transit Company filed April 7, 1938 adopting White Line tariffs. (Included in Item 12, Exhibit 1.)

16. Adoption notices of The Rock Island Motor Transit Company filed September 17, 1938, adopting White Line tariffs. (Included in Item 12, Exhibit 1.)

673 17. Adoption notices of The Rock Island Motor Transit Company filed September 17, 1938, adopting White Line tariffs. (Included in Item 12, Exhibit 1.)

18. Report and order of the Commission by Division 4, Commissioners Porter, Mahaffie, and Miller, filed and entered November 28, 1944 in Docket MC-F-2327, The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson, approving transfer, subject to conditions. (Item 17, Exhibit 1.)

19. Letter dated at Chicago, Illinois, December 28, 1944, addressed to Honorable W. Y. Blanning, Director, Bureau of Motor Carriers, signed by Martin L. Cassell, Jr., advising Commission of intentions to consummate Frederickson transaction by The Rock Island Motor Transit Company as of January 15, 1945. (Included in Item 18, Exhibit 1.)

20. Carbon copy of letter dated January 3, 1945, addressed to Martin L. Cassell, Jr., signed by W. Y. Blanning, Director, Bureau of Motor Carriers, acknowledging receipt of advice as to intended consummation of Frederickson purchase. (Included in Item 18, Exhibit 1.)

21. Letter dated at Chicago, Illinois, January 11, 1945, addressed to Honorable W. Y. Blanning, Director, Bureau of Motor Carriers, signed by Martin L. Cassell, Jr., advising of advancing of consummation date from January 15th to January 22, 1945 in Frederickson acquisition. (Included in Item 18, Exhibit 1.)

22. Carbon copy of letter dated January 22, 1945, addressed to Martin L. Cassell, Jr., Attorney, The Rock Island Motor Transit Company, signed by W. Y. Blanning, Director, Bureau of Motor Carriers, acknowledging letter of January 11, 1945, in regard to submission of journal entries and confirmation of date of consummation. (Included in Item 18, Exhibit 1.)

23. Letter dated at Chicago, Illinois, January 22, 1945, addressed to Honorable W. Y. Blanning, Director, Bureau of Motor Carriers, signed by Martin L. Cassell, Jr., advising of consummation having been effected January 22, 1944 (typographical error, should be 1945). (Included in Item 18, Exhibit 1.)

674 24. Letter dated January 25, 1945, addressed to Martin L. Cassell, Jr., Attorney, The Rock Island Motor Transit Company, signed W. Y. Blanning, Director, Bureau of Motor Carriers, acknowledging letter of January 22, 1945 confirming consummation. (Included in Item 18, Exhibit 1.)

25. Order of the Commission, entered February 5, 1945, on its own motion Dockets MC-F-445, MC-F-2327 and MC-29130 reopened for reconsideration on the present records, to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor carrier service performed by The Rock Island Motor Transit Company is limited to that which is auxiliary to, or supplemental of, rail service; and (b) the condition, if any appears necessary, which should be imposed so as to make the authority granted to The Rock Island Motor Transit Company subject to such further conditions or restrictions as the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service. (Included in Item 19, Exhibit 1.)

26. Report and order of the Commission, filed and entered March 4, 1946, in reopened Dockets MC-F-445 and MC-F-2327, restricting White Line and Frederickson routes to rail rates and rail billing and imposing key-points at Omaha, Nebraska, Des Moines, Iowa and collectively Davenport and Bettendorf and Rock Island, Moline and East Moline, Illinois, and ordering that the certificate theretofore issued in Docket MC-29130, insofar as the authority authorized in Docket MC-F-445, shall be modified, and the certificate to be issued in Docket MC-F-2327 shall be framed to comply with the restrictions of the Commission's order of March 4, 1946. (Included in Item 19, Exhibit 1.)

27. Letter dated at Chicago, Illinois, June 30, 1947, addressed to Honorable W. P. Bartel, Secretary, Interstate Commerce Commission, signed by M. L. Cassell, Jr., preserving its special appearance and advising Commission that The Rock Island Motor Transit Company did not request a reopening in its petition of May 23, 1946, as stated in Commission's order of June 19, 1947, but, on the contrary, denied authority so to do. (Included in Item 21, Exhibit 1.)

28. Carbon copy of letter dated July 9, 1947, addressed to M. L. Cassell, Jr., signed by W. Y. Blanning, Director, Bureau of Motor Carriers, acknowledging letter of June 30, 1947, above referred to. (Included in Item 21, Exhibit 1.)

29. Motion for vacation or rescission of order reopening proceedings in Dockets MC-F-445 and MC-F-2327, filed October 3, 1947 by The Rock Island Motor Transit Company. (Included in Item 22, Exhibit 1.)

Appellee designates the foregoing specified parts of the record for printing by the Clerk of this Court.

HARRY E. BOE

MARTIN L. CASSELL

*Attorneys for Appellee,*

*The Rock Island Motor Transit Company*

675A

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Designation by Appellee, The Rock Island Motor Transit Company, of Additional Parts of Record Which It Thinks Material, by mailing on May 9, 1950, a copy thereof to the following attorneys:

WILLIAM D. McFARLANE, Esq.

*Special Assistant to the Attorney General*  
Washington, D. C.

ALLEN CRENSHAW, Esq.

*Assistant Chief Counsel*

Interstate Commerce Commission  
Washington 25, D. C.

GEORGE COSSON, JR., Esq.

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Des Moines, Iowa

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Omaha Chamber of Commerce

Omaha, Nebraska

HENRY E. SASSO, Esq.

77 W. Washington Street

Chicago, Illinois

HARRY E. BOE

*Attorney for Appellee,*

*The Rock Island Motor Transit Company*

May 9, 1950.

676 (File Endorsement Omitted)

In the Supreme Court of the United States

677 *Stipulation Re Exhibits—Filed May 13, 1950*

It is hereby stipulated by and between the parties that on the appeal in the above-entitled cause counsel for any party may refer, in brief or oral argument, to any original exhibit included in the record filed with this Court but not printed, with the same force and effect as if the same had been printed.

PHILIP B. PERLMAN  
*Solicitor General*

DANIEL W. KNOWLTON  
*Chief Counsel*  
*Interstate Commerce Commission*

HARRY E. BOE  
MARTIN L. CASSELL  
*Attorneys for Appellee*

678 (File Endorsement Omitted)

679 Supreme Court of the United States

*Order Noting Probable Jurisdiction—*  
*March 27, 1950*

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

No. 25

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1950

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The United States of America and Interstate  
Commerce Commission, Appellants,

v.

The Reck Island Motor Transit Company,  
State of Iowa, ex rel. Iowa State  
Commerce Commission, and the Omaha  
Chamber of Commerce

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Appeal from the United States District  
Court for the Northern District  
of Illinois

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STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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Civil No. 49-C-1005

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
PLAINTIFF,

*v.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, DEFENDANTS

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**STATEMENT AS TO JURISDICTION**

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants, United States and Interstate Commerce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on November 29, 1949. A petition for appeal is presented to the district court herewith, to-wit, on January 28, 1950.

**OPINION BELOW**

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is not yet reported. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto.

## JURISDICTION

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Capital Transit Company*, 325 U.S. 357; *United States v. Detroit and Cleveland Navigation Company*, 326 U.S. 236; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515.

## QUESTIONS PRESENTED

1. Where the Interstate Commerce Commission has approved the purchase of a motor carrier by a railroad under Section 5(2) of the Interstate Commerce Act and issued a certificate of convenience and necessity to the motor carrier under Section 207, both conditioned on the motor service being auxiliary and supplemental to the rail service and reserving the power to amend, may the Commission reopen both proceedings to specify additional conditions confining the motor carrier to such supplemental service?

2. Where the Interstate Commerce Commission has approved the purchase of a motor carrier by a railroad under Section 5(2) of the Interstate Commerce Act, and a certificate of convenience and necessity has not yet been issued, may the Commission thereafter condition the grant of the certificate to the motor carrier, under Section 207, upon the requirement that all services be supplemental and auxiliary to the rail service?<sup>1</sup>

<sup>1</sup> All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the major issues.

## STATUTES INVOLVED

Sections 5(2) (a), (b), 5(9), 17(6), (7), 205(h), 206, 207, 208(a), 212 and 221(b) (49 U.S.C. §§ 5(2) (a), (b), 5(9), 17(6), (7), 305(h), 306, 307, 308(a), 312 and 321(b)) of the Interstate Commerce Act, as amended, are set forth in the Appendix, *infra*, pp. 12-16.

## STATEMENT

Appellee, hereinafter referred to as Transit, is a wholly owned subsidiary of the Chicago Rock Island and Pacific Railway engaged in the motor transportation business. In 1937 Transit applied to the Interstate Commerce Commission for permission to purchase the White Line Motor Freight Company, a motor carrier paralleling generally the Rock Island Railroad line from Chicago to Omaha. In a proceeding under the then Section 213 of the Interstate Commerce Act, now substantially re-enacted in Section 5(2) (a) and (b) (49 U.S.C. 5(2) (a) and (b)),<sup>2</sup> the examiner of the Commis-

<sup>2</sup> Section 5(2) (a) provides for Commission approval and authorization of the acquisition by one carrier of the properties, franchises, or control of another carrier. Section 5(2) (b) establishes the hearing procedure, and provides in pertinent part:

\* \* \* If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.* (Italics supplied.)

sion issued a report recommending approval of the purchase, including the transfer of whatever rights White Line would be entitled to under pending applications for "grandfather" certificates.<sup>3</sup> The examiner specifically recommended that Transit should not be authorized to engage in general trucking service at motor rates. Transit objected to this limitation. Following consideration, the Commission issued a report and order on April 1, 1938 (5 M. C. C. 451; 15 M. C. C. 763) authorizing the purchase. The report and order did not specifically restrict Transit in the terms of the examiner's recommendation, but referred to the limitations imposed by the Act upon the acquisition of motor carriers by railroads. The report points out that such carriers are confined to motor service which is exclusively auxiliary to and supplemental of rail service, referring particularly to the earlier decision in *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101 and 5 M. C. C. 9 and 49. The report and order specify as conditions of approval that (1) Transit shall not render service from or to, or interchange traffic at any point other than a station on the lines of the Rock Island Railroad, and (2) "that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we might find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition."

On December 3, 1941, the Commission issued to Transit a certificate of convenience and necessity (Docket No. MC-29130, formerly No. 49147), pur-

<sup>3</sup> Under Section 206 (47 U.S.C. 306).

suant to Sections 206 and 207 (49 U. S. C. §§ 306 and 307) authorizing Transit to operate over a number of routes, including the White Line routes. The certificate recites that "the operations authorized . . . are subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the Chicago Rock Island and Pacific Railway Company, and shall not unduly restrain competition."

In November, 1943 Transit applied for permission to purchase Frederickson & Son, a small carrier operating in the vicinity of a portion of the Rock Island Railway line near Omaha. Frederickson possessed a certificate of convenience and necessity previously issued to it under the "grandfather" clause (Section 206(a)). Division 4 of the Commission issued a report and order on November 28, 1944 (39 M. C. C. 824) approving the purchase under Section 5 (49 U. S. C. 5). The report states that if the transaction is consummated, Transit will be entitled to a certificate of convenience and necessity covering the rights previously granted to Frederickson. The report and order contained no provision subjecting the transfer to further modifications by the Commission, but recites that "nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act except Section 5 thereof, as expressly determined herein." Transit completed the purchase of Frederickson on January 22, 1945. No certificate of convenience and necessity has yet been issued to Transit covering this purchase.

On February 6, 1945, the Commission reopened the proceedings under which Transit had previously been issued a certificate of convenience and necessity, and the purchase transactions involving the White and Frederickson lines. Following argument, the Commission on March 4, 1946 issued a report and order, three commissioners dissenting, which defined the conditions of Transit's operation as a motor carrier (40 M. C. C. 457). Transit had conceded in the proceedings before the Commission that it was engaged in a general trucking business at motor rates over the White and Frederickson routes. The report of the Commission reviews its earlier decision defining the permissible activities of motor carriers controlled by railroads, and repeats the principles set forth in those decisions to the effect that the activities of such motor carriers must be confined to coordinate assistance to rail transportation, and that the Act prohibits such carriers from engaging in general motor carrier operations which would compete with the railroad and other motor carriers. The Commission refers to earlier decisions holding that permissible motor activities are generally limited to the carriage of railway freight at rail rates and on railway bills of lading, and as an incident to a pick-up and delivery service for the railroad. The report and order state that Transit's certificate of convenience and necessity should be modified by the imposition of certain conditions, among which are that Transit should perform only service that is auxiliary to or supplementary of the rail service of the Rock Island, and that shipments should not be transported by Transit between certain key points (consisting of designated larger cities on its routes). The order was made subject to such further specific

conditions as the Commission, in the future, might find it necessary to impose in order to insure that the motor service shall be auxiliary to or supplemental of train service.

Transit petitioned for a rehearing, which was granted, but Transit limited its appearance exclusively to disputing the jurisdiction of the Commission to issue the order of March 4, 1946, and offered no evidence. Following reargument, the Commission affirmed its previous order, and issued a further report and order on April 11, 1949, setting forth in substance the identical limitations on Transit's activities.

Transit brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, under Title 28, United States Code, Sections 1336 and 2321 to review the ruling of the Commission. The District Court set aside the reports and orders of the Commission of March 4, 1946 and April 11, 1949. It ruled that the action of the Commission in reopening the proceedings concerning Transit's purchases of White and Frederickson and Transit's certification on the White route, and in further specifying the conditions and limitations of Transit's activities, constituted a substantial change of the operating rights previously granted to Transit. The court held that such a change required a revocation proceeding under Section 212 (54 U. S. C. 312), and that, since the Commission had not followed this procedure, it had exceeded its authority under the Act and had deprived Transit of property without due process of law contrary to the Fifth Amendment.

#### THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of importance to the motor carrier and railroad indus-

tries, and to the Commission in the administration of the Interstate Commerce Act. The National Transportation Policy provides for the preservation of the inherent advantages of each form of transportation (49 Stat. 899; note 49 U. S. C. A. 1), and Section 5(2) (b) authorizes acquisition of motor carriers by railroads only if the transaction will enable the railway to use motor service to public advantage in its operation and will not unduly restrain competition. (*Supra*, footnote 2.) The Commission's authority under the Act to supplement its earlier orders for the purpose of confining motor carriers controlled by railroads to noncompetitive activities is in accord with the intent of Congress, as expressed in the National Transportation Policy requiring the independent development of the two means of transportation, and consonant with the decisions of the Commission and of the Supreme Court confining captive motor carriers to coordinate and supplemental services for the rail carriers. The judgment of the District Court is in direct conflict with this policy and contrary to the provisions of the Act. In addition, the District Court has refused to recognize the Commission's express authority, under its earlier orders, to add further specific conditions confining Transit's motor carrier operations to auxiliary and supplemental service.

1. The Interstate Commerce Act provides for continuing supervision by the Commission of the operating activities of motor carriers in order to effectuate the National Transportation Policy. Transit's purchase transactions required, and received, Commission approval under Section 5(2) (49 U. S. C. 5(2)). Section 5(9) specifically provides that "the Commission may from time to time,

for good cause shown, make such orders, supplemental to any order made under paragraph 5(2), as it may deem necessary or appropriate." With respect to certificates of convenience and necessity issued pursuant to Section 207, Section 208(a) (49 U. S. C. 308(a)) provide that "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require." Furthermore, Sections 17(6) and (7) provide rather broadly for reconsideration by the Commission of its earlier decisions (*Falwell v. United States*, 69 F. Supp. 71, affirmed per curiam, 330 U. S. 807), and Section 221(b) provides that Commission orders shall continue in force "until its further order." The Act thus contemplates that the Commission maintain a continuing check upon carriers in order to assure that they do not exceed the scope of activities permissible under the Act and the Commission's orders.

The conditional basis upon which the White purchase transaction was approved, and the certificate of convenience and necessity issued to Transit, are thus in accord with the statutory authority of the Commission. Both the White Line purchase approved on April 1, 1938 and the certificate issued on December 3, 1941 were specifically made subject to such further limitations or modifications as the Commission might find necessary to impose in order to insure that service shall be auxiliary or supplementary to train service and shall not unduly restrain competition. This reservation was, in substance, no more than an expression of the terms upon which the purchase had been approved and

the certificate issued, and an implementation of the authority conferred by the Act to supervise the carrier's continuing performance of these terms and conditions.

The Frederickson purchase report and order by Division 4 of the Commission, while not containing such a specific reservation (39 M.C.C. 824), was not a final authorization to engage in a general motor transport business, as the appellee was well aware. The order by its terms is limited to a determination of Section 5 purchase rights. No operational rights were conferred on Transit until a certificate of convenience and necessity issued covering these routes. Such a certificate was never issued, and, in fact, the proceeding before the Commission which led to the disputed orders of March 4, 1946 and April 11, 1949 was antecedent to the issuance of a certificate to Transit covering the Frederickson purchase. An order under Section 5(2) is not a certificate of convenience and necessity, and "was not a final or irrevocable action." *Falwell v. United States*, 69 F. Supp. 71, 74, affirmed per curiam, 330 U. S. 807; *McArthur v. United States*, 44 F. Supp. 697, affirmed per curiam, 315 U. S. 787.

2. The authority of the Interstate Commerce Commission to impose upon motor carriers the type of condition contained in its orders of March 4, 1946 and April 11, 1949, is settled. In *Interstate Commerce Commission v. Parker Motor Freight*, 326 U. S. 60, the Supreme Court notes the appropriateness of such restrictions:

As a further assurance that [the carrier] might not inadvertently have received privileges beyond the Commission's intention to grant, a right was reserved by the Commission

to impose such further specific conditions as it might find necessary in the future to restrict [the carrier's] operation "to service which is auxiliary to, or supplemental of rail service." 326 U. S. 63.

And at pages 70-72, the Court discusses the very type of key-point restriction imposed in the instant case, and the authority of the Commission to add additional conditions if necessary at some subsequent time, to prevent undue competition by the captive motor carrier:

Certificates of the general character of the one proposed by the Commission for [the carrier] have been granted heretofore. The motor service was not the normal over-the-road type but restricted to services auxiliary or supplemental to the rail service. In order to restrict motor carriers which were operated by railroads to this coordinated service, the Commission customarily inserted a provision in the order granting the application that the motor shipments must have prior or subsequent movement by rail. E. g. *Kansas City Southern Transport Co., Common Carrier Application*, 10 M. C. C. 221, 240. The rail carriers pointed out, however, that this restriction interfered with the efficiency of their operations, since commodities might be offered them at one way-station for transportation to another way-station within ordinary motor-ing distance. In such a case a way-freight train would be required. It was to meet this situation that the key-point or break-bulk rule, which is employed here, was developed. *Kansas City Southern Transport Co., Common Carrier Application*, 28 M. C. C. 5, 9, 11, 22 (par. 3), 25 (App. B).

This key-point requirement is one factor of differentiation between this certificate and the

normal over-the-road motor certificate of convenience and necessity. Other differentiations are found in the limitation of service to rail station points and the condition that the Commission reserved the right to impose such other requirements as might be found necessary to restrict the rail subsidiary to coordinated rail service instead of permitting general competition with motor carriers in over-the-road service.

. . . If the Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that injury to the public from impairment of the inherent advantages of motor transportation exceeds the advantage to the public of efficient rail transportation, the Commission may correct the tendency by restoration of the rail movement requirement or otherwise.

To the same effect is *American Trucking Associations v. United States*, 326 U. S. 77.

3. Appellee's contentions that it was misled by the reports of the Commission approving the purchases of White and Frederickson are without merit. The Frederickson approval was interlocutory and subject to limitation upon issuance of a certificate of convenience and necessity. The interlocutory nature of this order is normal in Commission procedure, and the appellee could have protected itself, by escrow arrangements or otherwise, pending final determination of its certificate rights. The report of the Commission approving the White purchase contained ample discussion of the type of service to which appellee would be confined. In specifying that it would be permitted to engage only in auxiliary and supplemental ac-

tivities, the report made clear that appellee would not be permitted to engage in independent and competitive motor carrier operation contrary to the policy of the Act and the previous rulings of the Commission. The report discusses at length the earlier decision of the Commission in *Pennsylvania Truck Lines, Inc.—Control—Barker Motor Freight, Inc.*, 1 M. C. C. 101, 5 M. C. C. 9 and 49, in which similar limitations are set forth. In reopening these earlier proceedings for the purpose of restraining appellee from engaging in this prohibited activity, the Commission was enforcing the terms of the White purchase order and the certificate previously issued. The assertion by appellee that these earlier rulings of the Commission purported to authorize a competitive trucking business not only is an unreasonably naive interpretation of the statute and decisions of the Commission, but requests judicial approval of an action by the Commission which, under appellee's interpretation, would have exceeded the authorization of the Interstate Commerce Act. Moreover, the plain reservation—in the purchase order and certificate—of power to issue further conditions “in order that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition” should have been both sufficient notice to the contrary, and warning that further proceedings might be had.

It is submitted that the decision of the District Court fails to recognize the authority granted the Commission by the Act to maintain compliance by carriers with the limitations imposed by the Act, and that it authorizes the appellee to engage in activities prohibited by the Act and the Commission's general policy under the Act. We believe

that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General,*  
DANIEL W. KNOWLTON,  
*Chief Counsel,*  
*Interstate Commerce Commission.*

January 25, 1950.

## APPENDIX A

The pertinent provisions of the Interstate Commerce Act, as amended, are as follows:

*Section 5(2)(a) and (b) (49 U.S.C. §§ 5(2)(a) and (b)).*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of

the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a), and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

*Section 5(9) (49 U.S.C. § 5(9)).*

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

*Section 17(6) and (7) (49 U.S.C. § 17(6) and (7)).*

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within

twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument or reconsideration as an original order.

*Section 205(h) (49 U.S.C. § 305(h)).*

(h) All the provisions of Section 17 of part I shall apply to all proceedings under this part.

*Section 206 (49 U.S.C. § 306).*

(a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however, That, subject*

to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only; was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve

such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

*Section 207 (49 U.S.C. § 307).*

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of pas-

sengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

*Section 208(a) (49 U.S.C. § 308(a)).*

(a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

*Section 212 (49 U.S.C. § 312).*

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and

shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

*Section 221(b) (49 U.S.C. § 321(b)).*

(b) Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

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#### APPENDIX B

### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49-C-1005

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

By this complaint plaintiff seeks to set aside, annul and enjoin an order of the Interstate Commerce Commission by which it is proposed to modify certificates of public convenience and necessity issued and to be issued to plaintiff as a motor common carrier of property in interstate commerce. This suit is brought under Sections 1336, 2284, 2322, 2323, and 2325, Title 28, United States Code. The State of Iowa by the Iowa State Commerce Commission, and the Omaha Chamber of Commerce,

a non-profit organization composed of shippers, manufacturers and wholesalers located at Omaha, Nebraska, were granted leave to intervene (Section 2323, Title 28, United States Code), and they appear in support of the complaint. The Court has jurisdiction of the parties and subject matter. It has had the benefit of evidence consisting of transcripts of the record of proceedings before the Commission in the cases, out of which the challenged order comes, as well as other pertinent proceedings before that agency.

This complaint presents the question whether the Commission has the power, apart from Section 212 of the Interstate Commerce Act, materially to change or modify—in effect partially to revoke—certificates and operating rights lawfully acquired in appropriate proceedings under Section 213 of the Motor Carrier Act of August 9, 1935, 49 Stat. L. 543, and Section 5(2)(a)(b) of the Interstate Commerce Act. The Commission makes no claim that it is here acting under Section 212, and the Court so finds. As a common carrier by motor vehicle plaintiff has been and now is transporting property over the highways in and between the states of Illinois, Iowa, and Nebraska, among other states. This service results from certificates and operating rights purchased in April, 1938, by plaintiff from White Line Motor Freight Company and White Line Trucking Company of Des Moines, Iowa. These companies were motor common carriers possessed of routes between Chicago, Illinois, and Omaha, Nebraska, and many intermediate points, with segments extending to Cedar Rapids and Muscatine, Iowa. In November, 1943, plaintiff also purchased the certificate and operating rights of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son, this partnership being a motor common carrier with a route located in western Iowa extending to Omaha, Nebraska. All points located on the White Line and Frederickson routes were stations on the line of railroad of Chicago, Rock Island and Pacific Rail-

road Company, a common carrier by railroad. At all times here involved plaintiff is and was a subsidiary of that railroad and predecessors in interest. Both plaintiff, as successor in interest to the White Line companies, and Fredericksons on their own account, had "grandfather" rights under a proviso in Section 206(a) of the Motor Carrier Act of August 9, 1935, 49 Stat. L. 551. Certificates in accordance therewith were issued in due course to plaintiff, as successor to the White Line companies, and to the Fredericksons.<sup>4</sup>

In October, 1937, plaintiff entered into an agreement to acquire the certificates, operating rights, equipment and terminal facilities, and good will of the White Line companies. As this transaction was subject to the approval of the Interstate Commerce Commission plaintiff filed its application<sup>5</sup> with the Commission. The application was assigned to an Examiner for hearing and on February 12, 1938, the Examiner issued a recommended report and order, recommending approval of the transaction subject to conditions among which was a condition that the plaintiff's motor operation be restricted to the rail rates and bills of lading of plaintiff's railroad affiliate. Plaintiff filed exceptions to this restriction, pointing out that its proposed method of operation included not only service auxiliary to its railroad affiliate, but also a motor common carrier service at motor rates similar to that rendered by its predecessors in interest. In its exceptions plaintiff advised the Commission that it would not go through with the transaction unless this restriction were eliminated. On April 1, 1938, the Commission entered a report and order by which it approved the transaction, making the

<sup>4</sup> ICC No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Company, Common Carrier Application. ICC Nos. MC-530 and MC-530, Sub. No. 1.—Application of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son.

<sup>5</sup> ICC Docket No. MC-F-445, The Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Inc., et al.

statutory findings required by Section 213 of the Motor Carrier Act of August 9, 1935, which became Part II of the Interstate Commerce Act, 49 Stat. L. 543. It eliminated the objectionable restriction from its order. With the Commission's authorization therefore the transaction was consummated, and plaintiff commenced operating upon the White Line routes on April 5, 1938, rendering a service at "all-motor" rates as a common carrier by motor vehicle and also a service coordinated with its affiliated railroad. As a condition precedent to consummation, and as required by the Commission's tariff publishing regulations issued under Sections 216 and 217 of Part II of the Interstate Commerce Act, plaintiff was obliged to and it did adopt the "all-motor" tariffs and rates of its predecessors in interest. Since April 5, 1938, plaintiff has continuously engaged in such operations. With respect to the Frederickson route plaintiff entered into an agreement to acquire this partnership's certificate of public convenience and necessity and operating rights, and on September 29, 1943, filed its application<sup>6</sup> with the Commission for approval of the transaction under Section 5(2)(a)(b) of the Interstate Commerce Act, 54 Stat. L. 905. Section 213 of Part II had in the meantime been repealed by the Transportation Act of September 1, 1940, 54 Stat. L. 919, and its substance was re-enacted into Section 5(2)(a)(b). As in the White Line case, plaintiff advised the Commission that it proposed to conduct a trucking service on the Frederickson route auxiliary to the affiliated railroad and also a service at all-motor tariffs and rates similar to that conducted by the Fredericksons. On November 28, 1944, the Commission approved the Frederickson transaction without any restrictions. On January 22, 1945, plaintiff consummated the transaction, and since that time plaintiff has operated continuously upon

<sup>6</sup> ICC Docket No. MC-F-2327. The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson.

the Frederickson route and unified that route with the White Line route acquired pursuant to the Commission's order of April 1, 1938. As in the White Line proceeding, the Commission's order of November 28, 1944, in the Frederickson proceeding made the satutory findings required by Section 5(2)(a)(b) of the Interstate Commerce Act. It provided further that plaintiff was entitled to the certificate of public convenience and necessity previously granted to the Fredericksons, and that the operating rights evidenced by said certificate could be unified with rights otherwise confirmed in plaintiff. In reliance upon the Commission's orders of April 1, 1938, and November 28, 1944, plaintiff paid the respective purchase prices of \$59,400.00 and \$6500.00 called for by its agreements, and also committed itself to large expenditures in the development of its business.

The order here challenged affirms the Commission's report and order of March 4, 1946,<sup>7</sup> by which the Commission upon its own motion in the acquisition proceedings referred to and on present records proposes materially to modify plaintiff's certificates by means of the imposition of new restrictions, as follows: (1) that henceforth plaintiff is without authority to perform service under "all-motor" local and "all-motor" joint rates with connecting motor carriers, and (2) plaintiff shall not transport any shipments between any of the following points, or through or to or from more than one of said points: Omaha, Nebraska, Des Moines,

<sup>7</sup> Commissioners Mahaffie, Miller, and Porter (now deceased) dissented to the report and order of March 4, 1946. Commissioners Mahaffie and Miller again dissented to the action reflected by the report and order of April 11, 1949, and Commissioner Mitchell (who succeeded Commissioner Porter) has also dissented. Commissioner Lee in *Kansas City Southern, etc.*, 28 M.C.C. 5, and Commissioner Rogers in *Rock Island Motor, etc.*, 33 M.C.C. 349, expressed views in agreement with plaintiff's contention that the term, "auxiliary to and supplemental of train service," did not foreclose plaintiff from conducting "all-motor" service, which the order of April 11, 1949, would now prohibit.

Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois—this restriction being known as a “key-point” restriction. The first restriction would limit plaintiff’s operations to the railroad rates and billing of its railroad affiliate, and the key-point restriction would substantially limit its physical operations and place added burdens on those that remain. The net effect would be materially to impair and destroy the value of the operating rights acquired by plaintiff from the White Line companies and Fredericksons. This action reflects a change of policy as stated or expressed by the Commission in Texas & Pacific M. Transport Co. Com. Car. Application, 41 M. C. C. 721, to which repeated reference has been made in the report on reopening of March 4, 1946, and the one now challenged of April 11, 1949. As regards plaintiff and as applied to it, this change of policy came eight years after it had consummated the White Line transaction, and more than a year after consummation of the Frederickson transaction. The report and order of March 4, 1946, were the first notice that plaintiff had that this new policy would be applied to it in connection with the certificates acquired by plaintiff in the White Line and Frederickson proceedings.

The operating rights acquired by plaintiff, and the certificates evidencing such rights, obtained in pursuance of the final orders of the Commission of April 1, 1938, in Docket No. MC-F-445, and November 28, 1944, in Docket No. MC-F-2327, are in the nature of franchise rights and can only be changed or revoked as provided by law. The condition in the White Line order of April 1, 1938, as carried into the certificate of December 3, 1941, issued to plaintiff, that the authority granted shall be subject to such further limitations, restrictions, or modifications as may be found necessary in order to insure that the service shall be auxiliary or supplementary to train service, would not be adequate to change or deprive plaintiff of these

vested rights. The fact is that plaintiff's operation is and has been auxiliary or supplementary to train service within the definition expressed by the Commission and as understood by plaintiff in April, 1938, when the rights and operating authorities of its predecessors, White Lines, became vested in plaintiff. So far as the Frederickson rights are concerned, no such condition was contained in the Commission's order of authorization of November, 1944. The only basis for a change or revocation in whole or in part of plaintiff rights must be found in Section 212(a), Part II of the Interstate Commerce Act, 49 Stat. L. 555, 49 U. S. C., Section 312(a). *U. S. and I. C. C. v. Seatrains Lines*, 329 U. S. 424; *Boulevard Transit Lines v. U. S. et al.*, 77 Fed. Supp., 594; *Smith Bros. Revocation of Order*, 33 M. C. C. 465. No such basis is here present or shown.

Plaintiff is a common carrier by motor vehicle within the definition of Paragraph 14 of Section 203(a) of Part II of the Interstate Commerce Act. That paragraph provides:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in transportation by motor vehicle \* \* \* of property \* \* \* for compensation."

The Supreme Court has had occasion to recognize and give full weight to the statutory definition, as for example in *U. S. v. Carolina F. C. Corporation*, 315 U. S. 475, at page 483, where the Court said:

"As we have noted a 'common carrier by motor vehicle' was defined in Section 203(a)(14) as one who 'undertakes' to transport 'passengers or property, or any class or classes of property for the general public'."

In the instant case the Commission by its report and order of April 11, 1949, assumes that it is authorized to burden plaintiff's certificate with the restrictions noted. There is nothing in the legis-

lative history<sup>8</sup> of the Motor Carrier Act referred to by defendants to indicate that Congress intended the Commission to deal with plaintiff because of its railroad affiliation in acquisition cases, such as are now before the Court, beyond the findings required by Section 213 of the Motor Carrier Act of 1935 and its re-enacted provisions in Section 5(2)(a)(b) of the Interstate Commerce Act. Those findings were appropriately made in the Commission's orders of April 1, 1938, in MC-F-445, and November 28, 1944, in MC-F-2327, and represented finality of action. *Seatrains Lines, Inc. v. United States*, 64 Fed. Supp. 156; affirmed in 329 U. S. 424. The proposed restrictions would materially change the character of plaintiff's operating authority and impair its ability to fulfill the obligations of a common carrier as defined in Section 203(a)(14). The restrictions are repugnant to the express provisions of the Statute. *U. S. v. Carolina Freight Carrier Corp.*, 315 U. S. 475. \*

As the operating rights acquired by plaintiff in pursuance of the orders of April 1, 1938, and November 28, 1944, were "grandfather" rights authorized by a proviso of Section 206(a) of the Motor Carrier Act, the impropriety of attempting to engraft limitations of the sort contemplated by the order of April 11, 1949, is manifest. In *U. S. v.*

<sup>8</sup> In hearings before the Congressional Committee on the coordinator's Draft of Bill, Frank McManamy, Chairman of the Legislative Committee of the Interstate Commerce Commission, stated that it was the unanimous recommendation of the Commission that railroads, "like anyone else," should be given certificates of convenience and necessity to operate competing bus and truck lines "in order to coordinate the different means of transportation and get the best out of all of them." (Hearings on H.R. 6836 before Legislative Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, pages 16 and 22.) Commissioner Eastman explained to the committee that his bill would permit a railroad to own bus and truck lines and to coordinate these different forms of transportation under one management. (Hearings on S. 1629, S. 1632, and S. 1635, before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Part I, page 85.)

Carolina Freight Carrier Corp., 315 U. S. 475, the Court had before it, as in these proceedings, the acquisition of "grandfather" rights from a predecessor in interest. Operations were shown to be common carrier in nature but over irregular routes in a designated territory. In granting the certificate the Commission sought to limit carriage of certain commodities to certain specified points. The Court struck down the restriction saying (p. 486):

"If the applicant had established that it was a 'common carrier' for a group of commodities or for an entire class or classes of property and was in 'bona fide operation' during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. \* \* \* Presumptively one who had established his status of 'common carrier' would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipments of any articles were authorized." \* \* \*

(Page 488) "But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure."

The Supreme Court recognized the gravity of such restrictions on common carrier operations:

(Page 488.) "To appellee such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. \* \* \* (Such) A restriction \* \* \* is a patent denial to appellee of that 'substantial parity between future opera-

tions and prior bona fide operations' which the Act contemplates."

The last quoted passage highlights the unlawfulness of the Commission's attempt to impose on plaintiff's certificates covering purchased operating rights conditions which are inconsistent with plaintiff's common carrier status, and which cut down its right to exercise the privileges granted to plaintiff and predecessors in interest.

In *Alton R. Co. et al. v. U. S.*, 315 U. S. 15, the Supreme Court again had occasion to consider the nature of operating rights which must under the statute be conferred by a certificate. The Court spoke of " \* \* \* creating that substantial parity between future operations and prior bona fide operations which the statute contemplates."

In the instant proceeding the Commission by its orders of April 1, 1938, and November 28, 1944, made the statutory findings that plaintiff's acquisition of the certificates and operating rights of White Lines and Fredericksons was consistent with the public interest and would not result in any undue restraint of competition. Plaintiff having acquired the "grandfather" operating rights to which the White Line companies and Fredericksons were initially entitled, the Commission had no lawful power to diminish those rights at some later date since those rights had become vested in plaintiff, as successor in interest, except as such power may be otherwise provided by statute. That power is delimited with precision in Section 212 of the Act and only in Section 212. Defendants make no claim in the instant case that the Commission's action reflected by its order of April 11, 1949, is premised upon any authority conferred by Section 212.

The Commission, being an agency of limited powers and authority, may not exceed its statutory powers. *United States v. Pennsylvania R. Co.*, 242 U. S. 208. Justification for the Commission's exercise of its administrative processes and authority must be found in some express provision of the

Interstate Commerce Act, of which the Motor Carrier Act is now a part as Part II. The Commission has recognized this elementary proposition in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, where it thus expressed itself:

"The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication, but should be conferred in clear and unmistakable terms. \* \* \* We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the Act. *Wisconsin R. Comm. v. Chicago & N.W. Ry. Co.*, 87 I.C.C. 195."

It is apparent that the proceedings covered by the order of April 11, 1949, were reopened to execute a new policy as expressed in the *Texas & Pacific* case, and that the Commission failed to observe these recognized limitations. Where, as here, the action of the Commission in the reopened proceedings results in a material change in plaintiff's certificates and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute. *I.C.C. v. Seatrains Lines*, 329 U. S. 424; *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *I.C.C. v. C.N.O. & T.P. Ry. Co.*, 167 U. S. 479. No such power is apparent from this record, and this is not a proceeding under Section 212 of the Interstate Commerce Act.

The purchase price of the White Line rights was \$59,400.00, and the purchase price for the Freder-

ickson rights was \$6500.00. Upon the consummation of the White Line deal on April 5, 1948, plaintiff proceeded to operate and develop the White Line routes. It alleges that if the order of April 11, 1949, should become effective, it stands to lose gross revenue in excess of a million dollars per year. Plaintiff's certificates and operating authorities are rights with very definite value. The Commission's action represented by the order of April 11, 1949, in revoking a substantial portion of plaintiff's certificates and operating authorities will destroy or materially impair their value. Certificates such as here involved and the rights which they confer are property of value. *City of Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Seatrain lines v. U. S.*, 64 F. Supp. 156, 161; *Crescent Express Lines v. U. S.*, 49 F. Supp. 92; *Capitol City W. P. & M. Co., Inc.*, 12 M.C.C. 79. Such rights are entitled to constitutional protection. *Frost v. Corporation Commission*, 278 U. S. 515; *United States v. Seatrains Lines, Inc.*, 329 U. S. 424. The Commission's order violates the Fifth Amendment to the United States Constitution.

The reports and orders of the Interstate Commerce Commission entered respectively on March 4, 1946, and April 11, 1949, are set aside and annulled, and permanently enjoined.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLI-  
NOIS, EASTERN DIVISION

Civil Action No. 49 C 1005

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, DEFENDANTS

FINDINGS OF FACT

The ultimate or relevant facts are found as follows:

1. Plaintiff, The Rock Island Motor Transit Company, is a corporation organized and existing under the laws of the State of Illinois, and is a common carrier by motor vehicle engaged in the transportation of property in intra and interstate commerce, among other places transporting property over the highways in interstate commerce in and between the states of Illinois, Iowa, and Nebraska, and has been so engaged since April 5, 1938.

2. Plaintiff is and heretofore has been a wholly-owned subsidiary of Chicago, Rock Island and Pacific Railroad Company and of its predecessors in interest. Chicago, Rock Island and Pacific Railroad Company is and its predecessors in interest were common carriers by railroad.

3. White Line Motor Freight Company, Inc., and White Line Trucking Company (White Lines) were affiliated trucking companies operating as common carriers of property by motor vehicle. So far as the rights involved in this proceeding are concerned, White Lines operated over a route or routes paralleling generally the line of Chicago, Rock Island and Pacific Railroad Company between Silvis, Illinois, and Omaha, Nebraska, and

between points intermediate thereto, including such points as Moline and Rock Island, Illinois, and Davenport, Iowa City, Newton, Des Moines, Atlantic and Council Bluffs, Iowa, all of which were and are points located upon lines of railroad of Chicago, Rock Island and Pacific Railroad Company. After June 1, 1935, the operations of White Lines as common carriers of property by motor vehicle were pursuant to "grandfather" applications filed with the Interstate Commerce Commission and pending at the time the transaction hereinafter described was consummated.

4. In October, 1937, plaintiff entered into purchase agreements which, upon consummation, would result in acquisition by plaintiff of the physical properties and operating rights of White Lines between Chicago and Omaha. The agreed purchase price to be paid by plaintiff was the sum of \$59,400.00. The proposed transaction was subject to the approval of the Interstate Commerce Commission under Section 213 of the Motor Carrier Act of August 9, 1935, U. S. Code Title 49, Section 313.

5. In October, 1937, plaintiff filed its application with the Interstate Commerce Commission for authority to acquire the operating rights and properties of White Lines. The application was docketed as No. MC-F-445 and assigned to an Examiner of the Interstate Commerce Commission for hearing. After hearing, on February 12, 1938, the Examiner filed a proposed report and order recommending that the transaction be approved subject, among other conditions not here pertinent, to the following conditions:

(1) That applicant shall not render service from or to, or interchange traffic at, any point other than The Chicago, Rock Island and Pacific Railway Company, and shall be subject to such further limitations as may hereafter be found necessary to impose in order to insure that the service shall be auxiliary or supple-

mentary to the train service of said railway and shall not unduly restrain competition; and

(2) That no truck service shall be conducted at other than rail rates.

6. Plaintiff filed exceptions to the Examiner's recommended report and order, taking particular exception to the imposition of condition number 2 above that no truck service should be conducted at other than rail rates. In its Brief of Exceptions plaintiff advised the Interstate Commerce Commission that, among other types of service, plaintiff proposed to utilize the operating rights of White Lines in the conduct of an all-truck service confined to points on the railroad "but in addition to rather than a substitute for rail service"; that any prohibition against the conduct of truck service at other than rail rates would so substantially impair the value to plaintiff of the operating rights and physical properties sought to be acquired as to question the propriety of the investment to which plaintiff had tentatively been committed; and that if the authority granted were so restricted as not to permit truck service at motor common carrier rates plaintiff would abandon the transaction.

7. Thereafter, on April 1, 1938, the Interstate Commerce Commission issued its report and order. Upon prescribed conditions set forth in the report, the purchase by plaintiff of the common-carrier operating rights of White Lines between Chicago and Omaha, including similar rights over branch routes to Muscatine and Cedar Rapids, and of the physical properties of White Lines, thereby was approved and authorized. The said prescribed conditions did not include condition number 2, recommended by the Examiner to which plaintiff had objected "that no truck service shall be conducted at other than rail rates." The Commission eliminated that condition and the report and order did not set forth any such restriction. And, following the issuance of the report and order, plaintiff was required by the Commission, upon consummation

of the proposed transaction, to adopt the motor common carrier rates and tariffs of White Lines.

8. Pursuant to said requirement plaintiff, effective April 5, 1938, adopted the motor common carrier rates and tariffs of White Lines in the form and manner prescribed by the rules of the Interstate Commerce Commission, and since that time and at present plaintiff, in the conduct of motor carrier operations, has been and is applying and observing said motor common carrier rates and tariffs as modified and amended from time to time.

9. In connection with the conduct of truck service from or to, or the interchanging of traffic at, any point not a station on the railroad, plaintiff had advised the Commission in its Brief of Exceptions and theretofore that plaintiff was agreeable to abandonment of all rights except common-carrier operating rights at stations on the railroad between Omaha, Nebraska, and Chicago, Illinois, and similar rights over branch routes to Muscatine and Cedar Rapids, Iowa. In its report and order of April 1, 1938, the Commission referred to this commitment by plaintiff and thereupon stated that "the 'grandfather' applications of White Lines will be considered as amended accordingly."

10. In its report and order of April 1, 1938, the Commission made the following findings, among others:

(a) that the purchase by plaintiff of the common-carrier operating rights of White Lines between Omaha and Chicago, and similar rights over branch routes to Muscatine and Cedar Rapids, including the right to operate pending determination of the "grandfather" applications, and the right to any certificates which may be issued as a result of said applications, will promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(b) that plaintiff shall not render service from or to, or interchange traffic at any point other than a station on the lines of said Railroad.

(c) that the conditions of Section 213 have been or will be fulfilled.

11. Relying upon the report and order of the Commission authorizing plaintiff to acquire the physical properties and common-carrier operating rights of White Lines between Omaha and Chicago, including similar rights over branch routes to Muscatine and Cedar Rapids, and upon the significant fact that the Commission did not impose as a condition of its approval the restriction recommended by the Examiner to which plaintiff had excepted, namely, "that no truck service shall be conducted at other than rail rates", plaintiff paid over the purchase price and the transaction was consummated on April 5, 1938.

12. After the issuance of the Commission's report and order of April 1, 1938, approving the White Lines transaction, plaintiff became the applicant in the then pending "grandfather" applications of White Lines. On August 5, 1938, the Commission entered an order that a Certificate of Public Convenience and Necessity shall be issued authorizing plaintiff to engage in interstate and foreign commerce as a common carrier by motor vehicle of commodities generally (except commodities in bulk, etc.) over the routes and between the points therein specified.

13. On December 3, 1941, the Commission issued its certificate covering the route between Silvis, Illinois, and Omaha, Nebraska, (among others), in conformity with its Report and Order of April 1, 1938, approving and authorizing the White Lines transaction.

14. The Authority granted by the aforementioned certificate and order, like the authority granted by the report and order of April 1, 1938,

approving the purchase of White Lines common-carrier operating rights, was not subjected to the restriction recommended by the Examiner to which plaintiff had objected "that no truck service shall be conducted at other than rail rates."

15. J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son (Fredericksons), was a partnership operating as a common carrier of property by motor vehicle. So far as the rights involved in this proceeding are concerned Fredericksons operated over a route or routes paralleling generally the lines of Chicago, Rock Island and Pacific Railroad Company between Omaha, Nebraska, and Atlantic, Iowa, and that railroad's branch lines extending to Avoca, and Harlan, Iowa, and between intermediate points located on said railroad. Fredericksons were possessed of a "grandfather" certificate.

16. On August 23, 1943, plaintiff entered into a purchase agreement which upon consummation would result in acquisition by plaintiff of certain truck equipment and the certificate and operating rights possessed by Fredericksons. The agreed purchase price to be paid by plaintiff was the sum of \$6500.00. The proposed transaction was subject to the approval of the Interstate Commerce Commission under Section 5(2)(a)(b) of the Interstate Commerce Act.

17. In September, 1943, plaintiff filed its application with the Interstate Commerce Commission to acquire said certificate and operating rights, and equipment of Fredericksons. The application was docketed as No. MC-F-2327, and assigned to an Examiner of the Interstate Commerce Commission for hearing. An Examiner's report was waived and on November 28, 1944, Division 5 issued its report and order approving the transaction. Plaintiff was required by the Commission, upon consummation of this transaction, to adopt the motor carrier rates and tariffs of Fredericksons. By said report and order it was also stated that plaintiff

would be entitled to a certificate covering the operating rights acquired and as granted to Fredericksons, which rights were authorized to be unified with the rights otherwise confirmed in plaintiff.

18. Plaintiff consummated the Frederickson transaction effective January 22, 1945; it adopted the motor common carrier rates and tariffs of Fredericksons in the form and manner prescribed by the rules of the Interstate Commerce Commission, and since that time and at present plaintiff, in the conduct of motor carrier operations, has been and is applying and observing said motor common carrier rates and tariffs as modified from time to time.

19. Relying upon the report and order of the Commission authorizing plaintiff to acquire the common carrier operating rights and properties and equipment of Fredericksons between Atlantic, Iowa, and Omaha, Nebraska, and intermediate points and between Harlan and Avoca, Iowa, and intermediate points located on the Chicago, Rock Island and Pacific Railroad, plaintiff paid over the purchase price and consummated the transaction on January 22, 1945.

20. Upon consummation of the transaction authorized by the Commission's orders of April 1, 1938, and November 28, 1944, and continuously since, plaintiff engaged and has engaged in the following methods of operation: (a) a coordinated rail motor service at rail rates auxiliary to the existing railway service of its railroad affiliate; (b) a motor carrier service in substitution of rail service, at rail rates; and (c) a motor carrier service at motor common carrier rates.

21. In its reports and orders of April 1, 1938, in Docket No. MC-F-445, and of November 28, 1944, in Docket No. MC-F-2327, the Commission made the statutory findings required by Section 213 of the Motor Carrier Act of 1935, and Section v(2)(a)(b) of the Interstate Commerce Act; i.e.: that these transactions were within the scope of

said sections and were being concluded upon just and reasonable terms; that the transactions would promote the public interest by enabling plaintiff's railroad affiliate to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49-C-1005

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CONCLUSIONS OF LAW

We conclude as matters of law:

1. This Court has jurisdiction of the parties and the subject matter of this suit.

2. The certificates, operating rights and privileges which plaintiff was authorized to purchase from White Lines and Fredericksons, included the right to engage in the following forms of trucking service upon the routes acquired: (a) a co-ordinated rail-motor service at rail rates auxiliary to the existing service of plaintiff's affiliated railroad; (b) a motor service in substitution of rail service, at rail rates; and (c) a motor common carrier service at tariffs observed and applied by plaintiff's predecessors as modified from time to time.

3. Prior to and at the time of the approval of the White Line transaction and the issuance in said proceeding of plaintiff's certificate, and at

the time of the approval of the acquisition of the Frederickson certificate, the term, "auxiliary to and supplemental of train service" did not prohibit the rendition of all motor service directly for the shipping public at all-motor rates in addition to service at rail rates in substitution for and in lieu of the rail service of plaintiff's affiliated railroad.

4. The Interstate Commerce Commission by its report and order of April 11, 1949, erred in finding that plaintiff is without authority to perform service under all motor local and all-motor joint rates with connecting carriers, and that plaintiff is without authority to enter into joint rates with other motor carriers. Such a restriction in plaintiff's certificates and operating rights would be a substantial diminution of plaintiff's certificates and operating authority, and constitutes a taking of plaintiff's property without due process of law.

5. The Commission's action, in imposing a key-point restriction that no shipments shall be transported by plaintiff between specified points or through or to or from more than one of said points, is unlawful. Such a restriction constitutes a substantial diminution of plaintiff's certificates and operating rights; it constitutes in whole or in substantial part a revocation of plaintiff's certificates and lawfully acquired operating rights, and would amount to a taking of plaintiff's property without due process of law.

6. The reopening and consideration on the Interstate Commerce Commission's own motion as evidenced by its reports and orders of March 4, 1946, and April 11, 1949, were unlawful and without statutory authority.

7. The certificates and operating rights acquired by plaintiff from White Lines and Fredericksons comprise property and franchise rights and the Interstate Commerce Commission erred in ordering a substantial modification and diminution

thereof. Such action would deprive plaintiff of its property without due process of law contrary to the Fifth Amendment of the United States Constitution.

8. The reports and orders of March 4, 1946, and April 11, 1949, substantially modify and eliminate rights lawfully acquired from predecessors in interest, and vested in plaintiff.

9. The Interstate Commerce Commission is an agency of limited powers and authority and may not exceed its statutory powers. The order of April 11, 1949, evidences an exercise of power beyond the powers and authority delegated to the Interstate Commerce Commission.

10. The Commission is without authority to modify or revoke a certificate once it has been issued, unless it comes within one of the provisions of Section 212(a) of Part II of the Interstate Commerce Act, 49 U. S. C. A., Section 312(a).

11. There is here present no condition that would bring the instant case within Section 212(a) of Part II of the Interstate Commerce Act, 49 U. S. C. A., Section 312(a).

12. Plaintiff will be irreparably damaged by said report and order of April 11, 1949, in that by denying it the right to transport traffic at all-motor rates as a common carrier by motor vehicle and restricting it to key point service as proposed, plaintiff will lose substantial revenues, and such action of the Commission will destroy and impair plaintiff's substantial investments in property of value, contrary to law.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLI-  
NOIS, EASTERN DIVISION

Civil Action No. 49-C-1005

THE ROCK ISLAND MOTOR TRANSIT COMPANY, PLAIN-  
TIF

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, DEFENDANTS

JUDGMENT

This cause came off to be heard on the 28th day of September, 1949, on plaintiff's complaint praying for a temporary restraining order, an interlocutory injunction and a permanent injunction, and a prayer that the reports and orders of the Interstate Commerce Commission entered respectively on March 4, 1946, and April 11, 1949, by the Interstate Commerce Commission in proceedings before it numbered and entitled Dockets MC-F 445, The Rock Island Motor Transit Company-Purchase-White Line Motor Freight Company, Inc., et al.; MC-F-2327, The Rock Island Motor Transit Company-Purchase-J. H. Frederickson and D. H. Frederickson; and No. MC-29130 (formerly No. MC 49147), The Rock Island Motor Transit Company, Common Carrier Application, be set aside, annulled, and enjoined; the State of Iowa, by the Iowa State Commerce Commission, and the Omaha Chamber of Commerce having intervened in support of the plaintiff's complaint, and the defendants having filed answers to the complaint and the petitions of intervention filed by said interveners; and the Court having heard the evidence and oral argument of counsel, and having examined the briefs filed by counsel, and the Court being fully advised in the premises,

Now therefore, it is ordered, adjudged, and decreed by the Court:

(1) That the reports and orders of the Interstate Commerce Commission decided and entered respectively on March 4, 1946, and April 11, 1949, the effective date of which has been extended to December 1, 1949, in proceedings under Dockets MC-F-445, The Rock Island Motor Transit Company-Purchase-White Line Motor Freight Company, Inc., et al.; MC-F-2327, The Rock Island Motor Transit Company-Purchase-J. H. Frederickson and D. H. Frederickson; and No. MC-29E30 (formerly No. MC-49147), The Rock Island Motor Transit Company, Common Carrier Application: be and they are hereby set aside, annulled, and enjoined; and

(2) That the defendants, their agents and attorneys, be and they hereby are permanently enjoined from enforcing or attempting to enforce the aforesaid reports and orders.

Entered at Chicago, Illinois, November —, 1949.

*Judge, United States Court  
of Appeals, 7th Circuit.*

*District Judge, United States  
District Court, Northern District  
of Illinois, Eastern Division.*

*District Judge, United States  
District Court, Northern District  
of Illinois, Eastern Division.*

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**In the Supreme Court of the United States**

OCTOBER TERM, ~~1949~~ 1950

**UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS**

**v.**

**THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
ET AL., APPELLEES**

**BRIEF OF THE INTERSTATE COMMERCE COMMISSION IN  
OPPOSITION TO APPELLEES' MOTION TO AFFIRM**

**ALLEN CRENSHAW,**  
*Assistant Chief Counsel,  
Interstate Commerce Commission.*

**DANIEL W. KNOWLTON,**  
*Chief Counsel,  
Of Counsel.*

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1949

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No. 654

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UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

v.

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
ET AL., APPELLEES

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**BRIEF OF THE INTERSTATE COMMERCE COMMISSION IN  
OPPOSITION TO APPELLEES' MOTION TO AFFIRM**

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## **STATEMENT**

The Motion of Appellees to Affirm, filed under provisions of paragraph 3, Rule 12, of the Revised Rules of the Supreme Court of the United States, was received in the mails on February 16, 1950.

Although the jurisdictional statement filed by appellants, as provided by Rule 12 of the Rules of the Supreme Court of the United States, sets forth the principal issues involved upon which it is contended that questions presented are substantial, and upon which it is believed that the

decree of the lower court should be reversed, submission of this brief is deemed justified and may be helpful to the court in clarifying and understanding the misconceptions as to facts and law, which appear in the said Motion to Affirm.

### **FACTS OF THE CASE**

The lower court decree annulled and permanently enjoined an order of the Commission entered on April 11, 1949, whereby certain restrictions and limitations were added to the operating authority previously granted to Rock Island Transit, hereinafter referred to as "Transit," in order to confine Transit service to that which is "auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition." Prior grant of the authority involved was made in two proceedings before the Commission, in Docket MC-F-445, Transit Purchase of White Line Motor Freight Company, and in Docket MC-F-2327, Transit Purchase of J. H. and D. H. Frederickson, Motor Carriers.

Application for approval of White Line transfer under provision of section 213 of the Motor Carrier Act of 1935 (49 U. S. C. 313) was filed October 13, 1937. After hearings, the filing of examiner's proposed report, and exceptions thereto as filed by various parties, Division 5 of the Commission entered its report and order on April 1, 1938, approving the transfer (5 M.

C. C. 451), with stated limitations of the operations authorized, including "(3) that the *authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition; \* \* \**" [Emphasis supplied.] The reference is to the Chicago, Rock Island and Pacific Railroad Company, of which Transit is a wholly owned subsidiary. The White Line application, pending under section 206 (a) of the Motor Carrier Act (49 U. S. C. 306), so transferred to Transit, was later considered and decided and a certificate issued on December 3, 1941, evidencing the authority granted, in practically the same terms as was stated in the report approving the transfer, including verbatim the number "3" provision above-quoted.

Transfer of the Frederickson authority was approved by the Commission order entered November 28, 1944, in a similar proceeding, with the difference that no certificate was issued and no similar limitations were stated or made in the order as was done in the White Line transfer. Instead the type of service to be rendered was reserved for further consideration in connection with the issuance of the certificate as later contemplated, as is authorized under section 208

(a) of the Interstate Commerce Act (49 U. S. C. 308).

By order of February 5, 1945, the Commission instituted proceedings involved in both the White and Frederickson transfers for reconsideration, solely to determine the conditions and restrictions, if any were found necessary, to insure that Transit service was limited to that which is supplemental or auxiliary to rail service. In other words, the proceeding was to determine whether or not Transit operations were limited to those authorized by orders approving the transfers, and if not, to add such conditions and restrictions as would insure such limitations of its service. The necessity for additional restrictions, under the reservation of the certificate in the White transfer, became apparent in the claims of Transit that it was operating a motor carrier service just as any independent motor carrier. With that information it could be specified, in the certificate to be issued in the Frederickson transfer, just what service was authorized.

The Commission Report on Reconsideration entered March 4, 1946 (40 M. C. C. 457), reviewed previous consideration and holdings in many cases involving approval of motor carrier authority for railroad subsidiaries as based upon statutory provisions. The report, pp. 458-459, noted from the original record of White Line that Transit proposed and desired to conduct a coordinated rail-motor service, and thereby to improve rail

service and recoup some less-than-carload traffic which had been lost to motor carriers. Referring to that record, it was noted that "the manner in which it was proposed to effect coordination of truck and rail service, and the advantages resulting from such coordination were shown in detail." The Commission concluded that additional restrictions were necessary to limit Transit service to that which had been originally granted, viz, that which is auxiliary to, or supplemental of, railroad service. The report, page 477, stated five numbered conditions and restrictions to be added to the prior certificate in the White Line authority, and to be incorporated in the certificate to be issued in respect to the Frederickson authority. These restrictions included, in addition to those previously stated in the White Line certificate, prohibition of shipments between five named key points, or through, or to, or from, more than one of said points. This restriction is intended to prohibit Transit service as an all motor carrier, independent of the railroad and in competition with regular motor carriers, as was originally intended when these transfers were approved. The finding also includes the prior reservation to add other restrictions in the future if they should become necessary to limit the service to that auxiliary to rail service.

Following the 1946 report, Transit petitioned for reconsideration to which the American Trucking Association filed a reply. A further hearing

was ordered and held to afford opportunity for interested parties to submit testimony. No one, including Transit, offered any evidence, and none was necessary for the Commission action since Transit not only admitted in pleadings, but proclaimed that it was operating as a regular independent common carrier by motor vehicle between Chicago and Omaha. Thereafter the Commission entered its final report and order on April 11, 1949 (55 M. C. C. 567), the order here involved, in effect affirming and restating the findings and conclusions of the 1946 report and order.

The lower court based its decree upon findings, in effect, that Transit acquired the entire operating rights of White Line and Frederickson under the "Grandfather" provisions of 206 (a) of the Interstate Commerce Act (49 U. S. C. 306), and therefore that reduction or revocation in part of that operating authority, and in the White Line proceedings as incorporated in its certificate, could lawfully be accomplished only under provisions of section 212 (a) of the Interstate Commerce Act (49 U. S. C. 312). In short, the lower court held that Commission approval of the White Line and Frederickson transfer, vested all rights of those applicants in Transit. The lower court, as does the Motion to Affirm herein, ignored the fact that the Commission did not approve the transfer of the operating rights without restrictions or limitations, and therefore has not in the proceed-

ings herein reduced or revoked the authority which was approved and granted to Transit.

### ISSUES PRESENTED BY THIS APPEAL

(1) Did all "Grandfather" rights of White Line and Frederickson, under their section 206 (a) applications, vest in Appellee, Rock Island Transit, by reason of the Commission approval of the purchase by and transfer to Transit?

(2) Does the reservation of a right to add restrictions in the future, as made in the order approving transfer to Transit in the White Line case, and the authority under section 208 (a) of the Act in the Frederickson case, lawfully permit the Commission to add further limitations, restrictions, or modifications to insure that Transit service shall be auxiliary to train service?

### ARGUMENT

Clearly this appeal can have no purpose to delay and it is equally as clear that questions of grave importance to the nation are presented for decision. Transit here seeks to establish legality of its claimed operations which in part includes a regular common carrier service by motor vehicle, just as that rendered by independent motor carriers, without reference to and not supplemental of, or auxiliary to, the railroad service.

Appellants here contend that provisions of statutes, as interpreted by the Commission and

the courts, and as herein applied under the facts of this case, prohibit any motor carrier service by Transit independent of and not auxiliary to, or supplemental of, the rail service of its parent corporation. This constitutes questions of extreme importance to the entire motor carrier industry, and threatens to make ineffectual the purpose of Congress to protect all modes of public transportation from destructive competition. The record of these and other similar proceedings indicate a railroad ambition, or at least the ambition of some railroads, to take over independent motor carrier operations and to disrupt, destroy or make that industry subservient to railroads. The 1946 Commission report herein, page 465, took note that 40 cases had previously been decided. Another appeal, involving practically identical questions as are here presented, has been taken in *Texas Pacific Motor Transport Company, et al. v. United States, et al.*, from the Northern District of Texas, and will doubtless be heard and considered concurrently with this appeal. A number of cases involving motor carrier operations of railroads or their subsidiaries have been decided by the courts, including *Thompson, Trustee of Chicago and Northwestern Ry. Co. v. United States*, 321 U. S. 19, *Interstate Commerce Commission, et al. v. Parker, et al.*, 326 U. S. 60, and *American Trucking Association, Inc., et al. v. United States, et al.*, 326 U. S. 77. This past, pending, and potential future litigation consti-

tutes a growing menace to orderly application of legislative plans for a fair and just regulation of all modes of public transportation, and indicates the great necessity for authoritative court decision of questions presented by this appeal.

## I

**Commission approval of the purchase by and transfer to Transit of "grandfather" operating authority, as applied for by White Line and Frederickson, Motor Carriers, under section 206 (a) of the act, did not vest authority in Transit to conduct an independent common carrier motor service**

The opinion of the lower court erroneously holds that Transit, as successor in interest to White Line and Frederickson, had "grandfather" rights under provisions of section 206 (a) of the Motor Carrier Act of 1935, and by virtue of such rights was authorized to operate as a motor common carrier, just as its predecessors had operated. The court findings of fact 12 and 17 are to the effect that Commission orders approving the transfers authorized Transit to engage in interstate commerce as a common carrier by motor vehicle of commodities generally, and entitled Transit to certificates covering the operating rights originally applied for by White Line and Frederickson. Finding 11 erroneously states that the Commission order approving the transfer authorized Transit to acquire the White Line common carrier operating rights between

Omaha and Chicago. Upon the basis of its interpretation in Conclusion of Law 3, that "auxiliary to, and supplemental of, train service" did not prohibit an all-motor service directly for the shipping public, the lower court erroneously held, Conclusion 2, that Commission approval of the White Line and Frederickson acquisition authorized the independent all-motor service by Transit. The lower court opinion erroneously held that Transit rights to operate as a regular independent common carrier by motor vehicle was a vested right, apparently based upon the erroneous findings and conclusions above stated, which could not be changed by reason of the order and certificate reservation of authority to add further restrictions, as may be found necessary to insure that Transit service shall be auxiliary to and supplement of train service. Under these erroneous findings and conclusions the lower court held that the addition of restrictions imposed by the order here involved, under the reservation made in approving transfer of White Line, and in that certificate later issued, constituted a diminution of operating rights held by Transit, and was therefore unlawful.

The Motion to Affirm is based upon the erroneous interpretations, findings, and conclusions of the lower court. The Motion undertakes to state the ultimate question presented by this appeal, by noting the court holding that the Commission may not lawfully change, modify, or

revoke, operating rights held by Transit, except under the provision of section 212 of the Act, the statutory authority for suspending or revoking certificates. The purported statement of facts related in the Motion to Affirm is no more than a careful selection of portions of evidence which lend appearance of support to the erroneous findings and conclusions of the lower court, and to the misconception of appellants' contentions in the Motion.

The record evidence and even the plain language of Commission reports and orders do not support the factual backgrounds, misinterpretations, and incorrect inferences assumed in the statements and contentions of Transit in its Motion to Affirm. The erroneous findings and conclusions of the lower court are not supported by the facts of record or by the Commission reports and orders. The statement of the appellee motion that "essential facts are not controverted" is a complete misconception of fact and unwarranted by the record. That statement is an erroneous assumption of appellee Transit and of the lower court, that the Commission order, approving purchase by and transfer of the operating rights of White Line and Frederickson, included the transfer thereof without limitation or restriction, and constituted Commission approval of Transit operations as an independent motor carrier without relation to its railroad affiliation. The record facts and language of the Commission reports very clearly

show the contrary, that the approval of these transfers were limited to service by Transit that is auxiliary to and supplemental of train service, and obviously did not grant Transit the right to operate as an independent motor carrier.

These were purchase cases in which the wholly owned railroad subsidiary acquired rights first applied for by independent motor carriers with no rail affiliation. The transfers were controlled by provisions of section 213 of the Motor Carrier Act of 1935, later repealed and embodied in section 5 (2) (b) of the Interstate Commerce Act (49 U. S. C. 5), the provisions of which have since controlled railroad acquisition of motor carrier operating authority. These provisions require for approval of such a transfer where a railroad is involved, that a public hearing be held, that the transaction will be consistent with public interest, will enable the carrier to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition.

The extent of Transit misconceptions, as to the authority originally granted, is revealed by the report of April 1, 1938, approving the White Line transfer. In considering the evidence the report noted the Transit plan of operation similar to that which had been approved in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, and 5 M. C. C. 9 and 49, also that testimony submitted by Transit provided the detailed manner in which "it is proposed to effect correlation

of truck-and-rail service" (5 M. C. C. 455). The report statement that many operating rights disapproved in the *Barker* case, would accrue to Transit "if no conditions were imposed," appears sufficient to certainly inform Transit that the conditions which were imposed could not be understood to authorize unrestricted and independent motor service.

Section 213 of the Motor Carrier Act of 1935, later embodied in section 5 of the Interstate Commerce Act of 1940, very clearly indicated the purpose of Congress to limit the operation of motor carrier service by railroads, and perhaps to prohibit all motor carrier service unrelated to rail service and in full competition with independent motor carriers. That intent appears with certainty from the legislative history of section 213 and the National Transportation Policy stated in the Act of 1940 (49 U. S. C., notes preceding sections 1, 301, and 901). The Federal Coordinator of Transportation, former Commissioner Eastman, was an important aid to Congress in preparing and presenting the 1935 Motor Carrier Act. His statements to the Interstate Commerce committees carefully explained how section 213, as later enacted, would permit use by railroads of highway motor service as a part of rail service, without any suggestion that railroads would be permitted to operate independent motor service (S. Doc. 152, 73d Cong., 2d Sess., pp. 45-49, 350-371). Statements of

Congressional leaders show that the views of former Commissioner Eastman were embodied in the Act finally adopted. The Chairman of the House Sub-Committee stated on the floor (79 Cong. Rec. 12, 206), "it is the intent, and it is important to the welfare and progress of the motor carrier industry, that acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation." In the Senate, the Chairman of the Interstate Commerce Committee said (79 Cong. Rec. 5882):

With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinative or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests.

In carrying out this responsibility the Commission has, in deciding many similar cases, recognized that different facts and public needs require a more rigid form of limitation and restriction in some cases than in others, in order to insure that railroad controlled motor service shall remain a part of rail service, and not be transformed into another independent motor carrier service. In the very beginning of regulation a somewhat standard form of restriction and limitation was established in the *Barker* case, *supra*, which permitted, by reference, the adop-

tion and application of basic principles there stated in similar subsequent cases. That basic principle, adopted and applied to the order here involved by reference to and quotation from the Barker report, is that rail-controlled motor service must be restricted to that which is auxiliary to, or supplemental of, rail service. That restriction prohibits independent motor service in competition with regular motor carriers, and only in exceptional cases, not here applicable, where there is proof of public need for continued independent motor service, has that type of service been authorized to railroad-controlled carriers. The record herein contains no proof of the part of witnesses submitted by Transit that there was any need for an independent motor carrier service. Insofar as the record is concerned, practically the only reference to the independent service was the statement of counsel for Transit that he hoped some day his company would be granted such an authority. On the basis of the legislative intent, the provisions of the statutes, and the proposals of Transit in its record evidence to provide a coordinated rail service, there is no question but that the Commission would have authority to restrict the operation of Transit under the White Line purchase to that which is auxiliary to, or supplemental of, rail service. Inclusion of the Commission in the report approving the White Line transfer and in the certificate later issued therein, of the reservation to add

further restrictions in future, should be conclusive that the Commission did not intend, and actually did not grant the right to unlimited motor carrier service. On this basis appellants contend that Transit was never granted all of the "grandfather" rights of White Line and Frederickson.

## II

**The Reservation in approving the White Line transfer and made in the certificate therein and the authority under section 208 (a) with reference to the Frederickson Transfer, authorized the commission to add restrictions to the White Line certificate, and to specify the service to be rendered in the Frederickson transfer, in order to insure that service of Transit would be restricted to that which is auxiliary to or supplemental of rail service**

The very purpose of reserving the right to add future additional restrictions, and even the language of that reservation, leaves no doubt that it was the intent of the Commission in the proceedings here involved, to carefully observe the legislative directive to safeguard the motor industry from destructive competition of railroads, which by extensions of authorized service may endanger the economic life of motor carriers. To sustain this contention it appears necessary only to cite the authority of this court as stated in its opinions in *I. C. C. v. Parker Motor Freight, supra*, and *American Trucking Association, Inc. v. U. S., supra*. In the *Parker* case, p. 565, the court said,

The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.

The opinion takes note of the National Transportation Policy "to preserve the inherent advantages of each mode of transportation," and of the provisions of section 213 (a) of the 1935 Act specifically regulating acquisition of motor carriers by railroads. Further the opinion noted the position of the Commission that the Willett application there involved sought authority to improve "an existing service," where the court stated its thought that the application was for a motor service to improve an existing rail service. With this in view the court stated as follows, pp. 69-70:

Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated

motor carriers, 42 M. C. C. 725-26, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. The public is entitled to the benefits of improved transportation.

The Parker opinion further recognized the administrative responsibility involved in such applications where it was stated on pp. 72-73:

Administrative discretion rests with the Commission to further improvements in transportation. The Interstate Commerce Act contains no provision by which the Commission may compel nonrail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers. When in railroad applications for coordinated motor service the Commission finds public convenience and necessity for such motor service on evidence of transportation advantages to shippers and economy to the rail carriers, cf. *Texas v. United States*, 292 U. S. 522, 530, it is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. In the absence of power to compel coordination between the modes of transportation and in the presence of the probable gains in operative efficiency from unified management, we think the Commission, in view of the limitations on the railroad's motor service, is entitled to conclude

that the public will be better served by the rail operation than by use of the available motor carrier facilities.

The above-quoted portion of the Parker opinion clearly indicates that approval of the Commission order, granting authority there involved, was only because that authority was rigidly limited to service auxiliary to, or supplemental of, rail service. This is further emphasized by the statement in the dissenting opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Rutledge concurred, page 76, that "certainly the effect on competition looms large when one type of carrier seeks to enter another field of transportation." Again the court opinion took note of the reservation in the certificate there concerned of the right to add restrictions in the future where it was stated, page 63:

As a further assurance that Willett might not inadvertently have received privileges beyond the Commission's intention to grant, a right was reserved by the Commission to impose such further specific conditions as it might find necessary in the future to restrict Willett's operation "to service which is auxiliary to, or supplemental of, rail service."

Thus, the interpretation of the statutory provisions which have been stated by the Commission in many cases, and included in the reports here involved, appear to have received full approval by this court, even to the extent of a distinct ap-

proval of a precise reservation here involved to add additional limitations, modifications, and restrictions, as a further assurance that Transit might not inadvertently have received privileges beyond the Commission's intention to grant, and as it might find necessary in the future to restrict Transit operations "to service which is auxiliary to, or supplemental of, rail service."

### CONCLUSION

The Motion to Affirm should be denied in order that this Court may pass upon the important issues here presented and authoritatively define the Commission's authority to add restrictions, when found necessary to prevent invasion by rail subsidiaries into the field of the independent motor carrier industry.

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*Chief Counsel,*  
*Of Counsel.*

MARCH 1950.

## APPENDIX

### INTERSTATE COMMERCE ACT

Section 5 (2) (b) (U. S. Code, title 49, sec. 5):

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable:

*Provided*, That if a carrier by railroad subject to this part, or any person which

is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 206 (U. S. Code, title 49, sec. 306) :

(a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the application or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof

that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, \* \* \*

Section 208 (U. S. Code, Title 49, Sec. 308) :

(a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 25

THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, APPELLANTS

v.

THE ROCK ISLAND MOTOR TRANSIT COMPANY, STATE  
OF IOWA, EX REL. IOWA STATE COMMERCE COM-  
MISSION AND OMAHA CHAMBER-OF COMMERCE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

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BRIEF FOR THE UNITED STATES AND INTERSTATE  
COMMERCE COMMISSION

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## OPINION BELOW

The opinion of the specially constituted district court (R. 204) is reported in 90 F. Supp. 516. The decision of the entire Interstate Commerce Commission on further hearing (R. 88), dated April 11, 1949, in Docket No. MC-F-445, affirming prior findings in 40 M. C. C. 457 (R. 56) dated March 4, 1946, is reported in 55 M. C. C. 567.

## JURISDICTION

The judgment of the district court was entered on November 29, 1949 (R. 221), the petition for appeal (R. 222) was filed January 27, 1950, and an order allowing the appeal was filed the same day (R. 223). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted on March 27, 1950 (R. 646).

## QUESTIONS PRESENTED

The questions presented in this appeal are similar to those raised in *United States, et al. v. The Texas & Pacific Motor Transport Company*, Nos. 38 and 39. This case likewise involves the acquisition of two motor carriers by a railroad. The first acquisition was approved by the Interstate Commerce Commission under Section 5 (2) of the Interstate Commerce Act, and a certificate of convenience and necessity subsequently was issued under Section 207. Both the approval and the certificate were made subject to such further restrictions as the Commission might impose in order to insure that the service shall be auxiliary and supplemental to the rail service. The second acquisition was approved under Section 5 (2) of the Act without the imposition of this condition, but no certificate of convenience and necessity had been issued under Section 207.

The question presented is whether, in a subsequent proceeding, the Commission may specify additional conditions to the certificate covering the

operations of the first motor carrier, and impose like conditions upon the certificate to be granted covering the second motor carrier, to confine the motor carrier operations to service auxiliary and supplemental to rail service.

#### STATUTES INVOLVED

The National Transportation Policy and Sections 5 (2) (a), (b), 5 (9), 202 (a), 206, 207, 208 (a), 212, 213 (a) (1) and 221 (b) (49 U. S. C. secs. 5 (2) (a), (b), 5 (9), 306, 307, 308 (a), 312 and 321 (b)) of the Interstate Commerce Act, as amended, are set forth in the Appendix, pp. 18-28.

#### STATEMENT

This is a direct appeal from the judgment (R. 221) of a specially constituted district court permanently enjoining and setting aside an order of the Interstate Commerce Commission made on April 11, 1949 (R. 88), reported in 55 M. C. C. 567. The order in issue reaffirmed an earlier decision of the Commission (R. 56) <sup>1</sup> attaching certain specific conditions to a certificate previously issued to the appellee, Rock Island Motor Transit Company, under section 213 (now sec. 5) and section 206 of the Interstate Commerce Act (49-U. S. C. secs. 5 and 306), and also to a certificate approved by the Commission under section 5 of the Act but not yet issued to that company, the effect of which is to

<sup>1</sup> This earlier decision of March 4, 1946 (40 M.C.C. 457) was also by the entire Commission and not merely that of Division 5, as inadvertently indicated by the Transcript (R. 56).

confine its motor carrier operations to a service auxiliary to or supplemental of rail service as contemplated by the Interstate Commerce Act and the National Transportation Policy.<sup>2</sup>

Appellee, Rock Island Motor Transit Company, is a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railway Company, hereinafter called "Railway" (R. 89). Transit was granted authority in respect to a series of applications to conduct certain described operations in interstate or foreign commerce as a common carrier by motor vehicle of property over regular routes which follow generally the line of Railway in Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Tennessee, and Texas (R. 57). The order of the Commission here in issue, made on April 11, 1949 (R. 88), affects the certificate issued in Docket No. MC-29130 (formerly No. MC-49147) insofar as it embraces motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-445, prior reports, *Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Incorporated, et al.*, 5 M.C.C. 451, and 15 M.C.C. 763, hereinafter called the *White Line Purchase Case*, and the certificate to be issued covering the motor common carrier operating rights acquired by the transaction approved and authorized in No. MC-F-2327,

<sup>2</sup> Note preceding 49 U.S.C. sec. 1. See Appendix, pp. 20-21, for the complete text of the National Transportation Policy.

prior report, *The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colpon, Trustees)—Control; The Rock Island Motor Transit Company—Purchase—J. H. Frederickson and D. H. Frederickson*, 39 M.C.C. 824 (R. 47), hereinafter referred to as the *Frederickson Purchase Case*. The first proceeding embraced Docket No. MC-29130, 33 M.C.C. 349, involving a grant of a certificate of public convenience and necessity issued to Transit by the Commission pursuant to section 206 of the Interstate Commerce Act, 49 U.S.C. sec. 306,<sup>3</sup> known as the "grandfather" clause. The *White Line Purchase*, Docket No. MC-F-445 (R. 56) was approved by the Commission under section 213 (now sec. 5) of the Interstate Commerce Act, 49 U.S.C. sec. 5.<sup>4</sup> (R. 57) The *Frederickson Purchase*, Docket No. MC-F-2327 (R. 47) was approved under section 5 of the Interstate Commerce Act (R. 54). In the *White Line Purchase* a certificate was granted to Transit and the Commission attached to said certificate only the conditions which it considered at the time to be necessary, the pertinent ones of which were (R. 35):

(2) that applicant shall not, if the authority herein granted is exercised, render service from or to, or interchange traffic at any point other than a station on the lines of said rail-

<sup>3</sup> See Appendix, page 23, for complete text of Section 206.

<sup>4</sup> See Appendix, pp. 21-23, for pertinent provisions of section 5, and particularly section 5 (2) (b).

road; (3) that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition.

In the *Frederickson Purchase* a certificate had not been issued by the Commission up to the time of the filing of the complaint (R. 91).

On February 5, 1945, the Commission, upon its own motion, entered an order reopening for reconsideration on the existing records the proceedings involved in the *White and Frederickson Purchases*, and in the common carrier application of Transit, solely to determine (a) the conditions or restrictions, if any appeared necessary, which should be imposed to insure that the motor-carrier service performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the conditions, if any appeared necessary, which should be imposed to make the authority granted to Transit subject to such further conditions or restrictions as the Commission might find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service (R. 59). The Regular Common Carrier Conference of the American Trucking Associations, Inc., was permitted to intervene (R. 60). The report of the Commission on reconsideration was entered on

March 4, 1946, 40 M.C.C. 457 (R. 56). By order of the Commission, entered May 14, 1946, upon the request of Transit, parties to the proceeding were permitted to file petitions for rehearing, reargument, or reconsideration of the findings in the report of March 4, 1946 (R. 131). Transit filed its petition for reconsideration and oral argument (R. 131), to which a reply was filed by the American Trucking Association (R. 131). The Commission entered its report on further reconsideration on April 11, 1949, 55 M.C.C. 567 (R. 88). This report reviews the procedure following Transit's petition for reconsideration of and oral argument on the report of March 4, 1946. It discusses the motion of Transit to rescind the order reopening the proceedings, the overruling of said motion, the fact that a further hearing was held on October 9, 1947, at which Transit entered a special appearance to contest jurisdiction of the order but offered no witnesses or evidence, and pointed out that no evidence was offered by other parties appearing at the hearing (R. 93).

The report of the Commission of April 11, 1949, finds that certificates held by Transit, under its own applications and in the *White* proceedings should be conditioned and restricted as stated in five specific restrictions,<sup>5</sup> in order to limit the service of

<sup>5</sup> The restrictions placed on the certificates in the report and order of April 11, 1949, 55 M.C.C. 567, were as follows (R. 126):

1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which

Transit to that which is supplemental of or auxiliary to rail service (R. 126). Said report also states that final approval of the authority in the *Frederickson* proceeding should be so conditioned and restricted (R. 126).

On April 11, 1949, the Commission entered an order to the effect that the certificate issued to Transit under its own application as purchased in the *White* proceedings, should be modified as found and directed in said report of the same date (R. 128). This order also directed that an amended certificate be issued to Transit and that the certificate to be issued Transit in the *Frederickson* purchase proceeding be made to conform to the same conditions and restrictions (R. 128).

This order of April 11, 1949, was made effective May 31, 1949 (R. 128), which effective date was

is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railroad Company, hereinafter called the Railroad.

2. The Rock Island Motor Transit Company shall not render any service to or from any point not a station on a rail line of the Railroad.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between The Rock Island Motor Transit Company and the Railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. (R. 126)

further extended by the Commission from time to time until the district court, on November 29, 1941, entered a permanent injunction (R. 221).

#### SPECIFICATION OF ERRORS TO BE URGED

The errors assigned in the Brief for the United States and Interstate Commerce Commission in *United States v. The Texas and Pacific Motor Transport Company*, Nos. 38 and 39, are, so far as applicable, incorporated by reference herein.

#### SUMMARY OF ARGUMENT

Since the legal issues raised in this case are, in our view, identical with those in *United States v. The Texas & Pacific Motor Transport Company*, Nos. 38 and 39, the Court is respectfully referred to the brief of the United States and Interstate Commerce Commission in that case.

A minor factual distinction present here does not affect the Commission's statutory power to impose conditions designed to restrict the motor carrier to service auxiliary to the railroad. In the purchase of the Frederickson line, the Commission granted approval without explicitly reserving the right to add additional restrictions in the future. But no certificate of convenience and necessity as yet has been issued covering the Frederickson operations and the Act contemplates the imposition of such safeguards before the final certification. Approval of the purchase under Section 5 was an interlocutory step creating no vested right in Transit, and in any event could grant no authorization of activity.

ties beyond the scope of those contemplated by the Act.

#### ARGUMENT

### I.

**The construction and application given by the Commission to Section 213 (now Sec. 5) of the Act is required by its language, is confirmed by its legislative history and Congress' transportation policy, and has been consistently adhered to in numerous decisions.**

The legislative background of the mandate of Congress contained in Section 213 of the Interstate Commerce Act and those other sections bearing upon the acquisitions of motor carriers by railroads, as well as the history of the Commission's rulings in interpreting this mandate, have been discussed at length in Point I of the brief for the United States and the Interstate Commerce Commission in *United States v. The Texas & Pacific Motor Transport Company*, Nos. 38 and 39. We will not duplicate this material here, but respectfully refer the Court to that discussion. And see, generally, *Note*, 63 Harv. L. Rev. 1437 (1950).

### II

**The Commission acted within its statutory authority and did not deprive Transit of property without due process of law.**

Appellee argues that in imposing additional specific restrictions, the Commission exceeded its statutory authority to alter certificates, and that its action constituted a revocation under Section

212. Since the Commission did not conform to the requirements of Section 212, Transit alleges that it was deprived of property without due process of law.

These contentions have been answered fully in Point 41 of the brief of the United States and Interstate Commerce Commission in the *Texas and Pacific* case, Nos. 38 and 39. Since, in our view, the legal issues raised here are identical, we will not burden the Court with repetition, but respectfully refer it to that brief.

There is a factual difference involved in this case upon which appellee relies. In the Frederickson purchase, Commission approval did not include an explicit reservation of the right to impose additional restrictions to confine the carrier to auxiliary service. Further, no certificate of convenience and necessity has yet been issued to Transit covering the Frederickson operations. We submit that these circumstances do not diminish the Commission's authority, but rather that the fact the Commission has not yet issued a certificate defining the permitted motor carrier operations is added reason why it may, in an interlocutory proceeding, impose the restrictions required by the Act.

In view of this factual distinction, however, we add a brief discussion of the Frederickson purchase.

The *Frederickson proceeding*, No. MC-F-2327,

was initiated by application filed September 29, 1943, under section 5 of the Interstate Commerce Act for approval of appellee's proposed purchase of certain operating rights of Frederickson and Son, as more fully detailed in the report of Division 4 which approved the application November 28, 1944 (R. 120). Such approval was granted with the finding that the proposed purchase— (R. 120)

\* \* \* \* will enable *The Chicago, Rock Island and Pacific Railway Company* \* \* \* to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition \* \* \*. (Emphasis supplied.)

There was no condition imposed specifically restricting the operations to a service auxiliary to or supplemental of rail service, nor was there a reservation of the right to impose future restrictions. Transit completed the purchase on January 22, 1945, and began operations shortly thereafter (R. 120). No certificate has yet been issued to Transit pursuant to the grant of approval of the purchase. The proceeding granting approval was reopened by the Commission on its own motion and the acquired rights were made subject to the same five conditions as were imposed in the reconsideration of the *White proceeding* (R. 120).

Transit alleges that the imposition of these five conditions modifies or revokes acquired and vested rights, and alleges that such action is not warranted

by Section 212 of the Act which Transit alleges is the only section authorizing the Commission to modify or revoke such rights (R. 13).

Section 212<sup>6</sup> of the Act by its very terms operates only in respect to certificates, permits, and licenses. In *Gregg Cartage Co. v. United States*, 316 U. S. 74, at page 84, this Court said:

But by its terms § 212(a) is applicable only where a certificate has already issued; \* \* \*.

Applicable to this situation, also, are sections 17 (6) and (7) which by section 205(h) are made applicable to all proceedings under Part II of the Act. A comprehensive discussion of these sections, including the applicability of section 212(a), is found in *Falwell v. United States*, 69 F. Supp. 71 (W. D. Va.), affirmed *per curiam*, 330 U. S. 807. In the opinion of the district court at page 74 it was said:

Acting presumably upon the strength of the examiner's report and its own consideration of the facts Division 4 approved the application of the plaintiffs as set out in its order of February 22, 1945. But this was not a final or irrevocable action. Sect. 17 of the Act, 49 U. S. C. A. Sect. 17, which, among other things, deals with Commission procedure and the division of the members of the Commission into Divisions provides (in Sect. 17(6)) that any decision, order or requirement made by the Commission, a division, an individual Com-

<sup>6</sup> The section is set out in the Appendix, pp. 26-28.

missioner or a board shall, on application therefor, be subject to rehearing or reconsideration under such rules as the Commission may determine. And Sect. 17(7) provides that after such rehearing or reconsideration of the decision or order of a division or of an individual Commissioner, the Commission may reverse, change or modify the same.

Further, in its opinion at page 75, the court said:

But any action which the plaintiffs took toward carrying out the provisions of the order was, as they well knew, subject to what might happen if, as a result of reconsideration by the full Commission, the order was reversed or modified.

In view of the plain terms of the statute and the evident regularity of the procedure in compliance therewith, we see no justification for the contention that the order of February 22, 1945, was in effect a certificate of public convenience and necessity terminable only by a proceeding under Sect. 212(a) of the Act.

It may be noted here that section 221(b)<sup>7</sup> of the Act provides:

Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, accord-

<sup>7</sup> The section is set out in the Appendix, p. 28.

ing as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

In *McArthur v. United States*, 44 F. Supp. 697 (N.D. Ill.), affirmed *per curiam*, 315 U. S. 787, the court said:

The "compliance order" of the Interstate Commerce Commission, dated May 16, 1938, was temporary and not a final order and by its own terms and within the lawful authority of the Commission could be set aside and vacated, with or without notice to the applicants as was done by the Commission in its order of March 11, 1939, and the subsequent action of and procedure before the Commission, including the report and order of January 11, 1941, were lawful.

Finally, in *Sprague v. Woll*, 122 F. 2d 128 (C. A. 7), certiorari denied, 314 U. S. 669, the court held that under section 16(a) (now section 17(6)) the power of the Commission to reopen orders was not limited to instances where petitions for reopening are received, but also includes authority to reopen the proceeding on its own motion whenever it deems it necessary so to do. It may be noted, also, that Section 17(6) places no time limitation upon the Commission's exercise of this power.

Thus there is ample authority in the statute and

judicial precedents to support the power exercised by the Commission in this case. This power of the Commission cannot be denied merely because Transit made expenditures based on the original order. Transit was put on notice by the Interstate Commerce Act as to the Commission's power. In *Baldwin & Scott County Milling Co.*, 307 U. S. 478, a shipper had received reparations from a carrier based on a decision of the Interstate Commerce Commission. Some time later, when the money had been expended, it was found that the carrier should not have paid the money to the shipper. The carrier thereupon demanded return of the money. The shipper had used part of the funds for legal fees which it could not recover, and it pleaded that it would be inequitable because of a mistake by the Interstate Commerce Commission to make it pay back the sum of money involved as it had no legal remedy to recollect the legal fee. This Court said, at page 485:

The retention by respondent of money collected under the findings and order that the commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act.

\* \* \* \* \*

Moreover, equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges.

It is submitted, therefore, that the Commission was acting entirely within the scope of its authority when it made the order in the case at bar.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's order was valid and within its statutory powers, and that the decision of the district court should be reversed and the complaint ordered dismissed.

Respectfully submitted,

PHILIP B. PERLMAN,

*Solicitor General.*

WM. AMORY UNDERHILL,

*Acting Assistant Attorney General.*

DANIEL W. KNOWLTON,

*Chief Counsel.*

EDWARD M. REIDY,

*Associate Chief Counsel,*

*Interstate Commerce Commission.*

OCTOBER, 1950.

## APPENDIX

Pertinent provisions of the Interstate Commerce Act, including Section 202 (a) and Section 213 (a) (1) of the Motor Carrier Act, 1935.

Section 202 (a), Motor Carrier Act, 1935 (49 Stat. 543):

It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Section 213 (a) (1), Motor Carrier Act, 1935 (49 Stat. 555):

It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge

their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

(1) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the pro-

ceeding of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

#### National Transportation Policy

[*Added September 18, 1940.*] [*U. S. Code, title 49, notes preceding secs. 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment

and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

#### ☛ Combinations and Consolidations of Carriers

Sec. 5 [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, August 9, 1935, and September 18, 1940.*] [*U. S. Code, title 49, sec. 5.*] (2) (a). It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise;

or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving

and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

\* \* \* \* \*

(9). The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

#### Application for Certificate of Public Convenience and Necessity

Sec. 206 [*Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*U.S. Code, title 49, sec. 306.*] (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public con-

venience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any

State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

### Issuance of Certificate

Sec. 207 [Added August 9, 1935.] [U. S. Code, Title 49, sec. 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

## Terms and Conditions of Certificate

Sec. 208 [*Added August 9, 1935.*] [*U. S. Code, title 49, sec. 308.*] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6); *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

## Suspension, Change, Revocation, and Transfer of Certificates, Permits, and Licenses

Sec. 212 [*Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*U. S. Code, title 49, sec. 312.*] (a) Certificates, permits, and

licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than

fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

#### Orders, Notices, and Service of Process

Sec. 221 [*Added August 9, 1935, as amended September 18, 1940.*] [*U. S. Code, title 49, sec. 321.*]

\* \* \* \* \*

(b) Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

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SUPREME COURT OF THE UNITED STATES R. 6 1950

OCTOBER TERM, 1949

1950

CHARLES ELMORE COTTELL

No. ~~854~~ 25

THE UNITED STATES OF AMERICA AND INTER-  
STATE COMMERCE COMMISSION,

*Appellants,*

vs. 9

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
STATE OF IOWA, EX REL. IOWA STATE COM-  
MERCE COMMISSION, AND THE OMAHA CHAMBER  
OF COMMERCE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS

**MOTION TO AFFIRM**

HARRY E. BOE,  
MARTIN L. CASSELL,  
ERNEST PORTER,  
GEORGE COSSON, JR.,  
ROBERT H. HEINECAMP,  
HENRY E. SASSO,

*Counsel for Appellees.*

W. F. PETER,  
A. B. ENOCH,

*Of Counsel.*

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION

---

Civil Action No. 49-C-1005

---

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Defendants*

---

**MOTION TO AFFIRM**

---

Appellees, The Rock Island Motor Transit Company, which was the plaintiff before the Three-Judge District Court, and herein referred to as Motor Transit; The State of Iowa, by the Iowa State Commerce Commission, and the Omaha Chamber of Commerce, a non-profit organization composed of shippers, manufacturers and wholesalers located at Omaha, Nebraska, which are intervenors in support of the complaint herein, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment and decree entered on November 29, 1949, by a specially constituted Three-Judge District Court pursuant to Sections 1253, 2284, and 2325, Title 28 of the United States Code, setting aside, annulling, and permanently enjoining orders of the Interstate Commerce Commission decided and entered respectively on March 4, 1946, and April 11, 1949, in pro-

ceedings under Dockets MC-F-445, The Rock Island Motor Transit Company-Purchase-White Line Motor Freight Company, Inc., et al.; MC-F-2327, The Rock Island Motor Transit Company-Purchase-J. H. Frederickson and D. H. Frederickson; and No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Company, Common Carrier Application. Appeal was allowed on January 27, 1950.

As noted by the Three-Judge District Court in its opinion, the ultimate question in issue is whether the Interstate Commerce Commission has the power, apart from Section 212 of the Interstate Commerce Act, materially to change or modify—in effect partially to revoke—certificates and operating rights lawfully acquired by Motor Transit in appropriate proceedings under Section 213 of the Motor Carrier Act of August 9, 1935, 49 Stat. L. 543, and Section 5(2)(a)(b) of the Interstate Commerce Act. The court farther stated that the Commission makes no claim that it is here acting under Section 212, and the court so found.

Motor Transit is a common carrier by motor vehicle transporting property over the highways in and between the States of Illinois, Iowa, and Nebraska, among other States. This service results from certificates of public convenience and necessity and operating rights purchased in April, 1938, from White Line Motor Freight Company and White Line Tracking Company of Des Moines, Iowa. The White companies were motor common carriers possessed of routes between Chicago, Illinois, and Omaha, Nebraska, and many intermediate points, with segments extending to Cedar Rapids and Muscatine, Iowa. In November, 1943, Motor Transit also purchased the certificate and operating rights of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son, this partner-

ship being a motor common carrier with a route located in western Iowa, extending to Omaha, Nebraska. All points located on the White and Frederickson routes were stations on the line of railroad of Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad, of which Motor Transit is a wholly owned subsidiary. Both Motor Transit, as successor in interest to the White companies, and Fredericksons on their own account, had "grandfather" rights under a proviso in Section 206(a) of the Motor Carrier Act. Certificates in accordance therewith were issued in due course to Motor Transit, as successor to the White Companies, and to the Fredericksons.<sup>1</sup>

In October, 1937, Motor Transit entered into an agreement to acquire the certificates, operating rights, equipment and terminal facilities, and good will of the White companies. Since this transaction was subject to the approval of the Interstate Commerce Commission, Motor Transit filed its application<sup>2</sup> with the Commission. The Examiner, to whom the application was assigned for hearing, issued his recommended report and order on February 12, 1938, recommending approval of the transaction subject to conditions among which was a condition that Motor Transit's operation be restricted to the rail rates and bills of lading of its railroad affiliate. Motor Transit filed exceptions to this restriction, pointing out that its proposed method of operation included not only service auxiliary to its railroad affiliate, but also a motor common carrier service at motor rates similar to that rendered by its predecessors in interest. In its exceptions Motor Transit advised the Commis-

<sup>1</sup> ICC No. MC-29130 (formerly No. MC-49147), The Rock Island Motor Transit Company, Common Carrier Application, ICC Nos. MC-530 and MC-530, Sub. No. 1—Application of J. H. and D. H. Frederickson, doing business as J. H. Frederickson and Son.

<sup>2</sup> ICC Docket No. MC-E-445, The Rock Island Motor Transit Company—Purchaser—White Line Motor Freight Company, Inc., et al.

sion that it would not go through with the transaction unless this restriction were eliminated. On April 1, 1938, the Commission entered a report and order by which it approved the transaction, making the statutory findings required by Section 213 of the Motor Carrier Act of August 9, 1935, which became Part II of the Interstate Commerce Act. The Commission eliminated the objectionable restriction from its order. With the Commission's authorization therefore Motor Transit consummated the transaction, and commenced operating upon the White routes on April 5, 1938, rendering a service at "all-motor" rates as a common carrier by motor vehicle and also a service coordinated with its affiliated railroad. As a condition precedent to consummation, and as required by the Commission's tariff publishing regulations, Motor Transit was required to adopt the "all-motor" tariffs and rates of its predecessors in interest. Since April 5, 1938, Motor Transit has continuously engaged in such operations.

As regards the Frederickson route, Motor Transit entered into an agreement to acquire this partnership's certificate and operating rights and filed its application<sup>3</sup> for approval of the transaction on September 29, 1943, under Section 5(2)(a)(b) of the Interstate Commerce Act, 54 Stat. L. 905. Section 213 of Part II had in the meantime been repealed by the Transportation Act of September 1, 1940, 54 Stat. L. 919, and its substance was reenacted into Section 5(2)(a)(b). As in the *White* case, Motor Transit advised the Commission that it proposed to conduct a trucking service on the Frederickson route auxiliary to Motor Transit's affiliated railroad and also a service at "all-motor" tariffs and rates similar to that conducted by the Fredericksons. On November 28, 1944, the Commission approved the Frederickson transaction without any restric-

<sup>3</sup> ICC Docket No. MC-F-2327, The Rock Island Motor Transit Company—Purchaser—J. H. Frederickson and D. H. Frederickson.

tions, and on January 22, 1945, Motor Transit consummated the transaction, and since that time has operated continuously upon the Frederickson route and unified, as authorized by the Commission, that route with the White route. As in the White proceeding, the Commission's order of November 28, 1944, in the Frederickson proceeding made the statutory findings required by Section 5(2)(a)(b),<sup>o</sup> and provided further that Motor Transit was entitled to the certificate previously granted to the Fredericksons.

The order here challenged of April 11, 1949, affirms the Commission's report and order of March 4, 1946, by which the Commission upon its own motion reopened the acquisition proceedings referred to and on present records ordered that Motor Transit's certificates be now materially modified by the imposition of new restrictions, as follows: (1) that henceforth Motor Transit is without authority to perform service under "all-motor" local and "all-motor" joint rates with connecting motor carriers, and (2) that it shall not transport any shipments between any of the following points, or through or to or from more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois—this restriction being known as a "key-point" restriction. The effect of these restrictions would be materially to impair and destroy the value of the operating rights acquired by Motor Transit from the White companies and Fredericksons. The Commission's action reflects a change of policy, long after the acquisitions by Motor Transit were approved by the Commission and consummated. The action reflects a change of policy as expressed by the Commission in Texas & Pacific M. Transport Co. Com. Car. Application, 41 M.C.C. 721, which is repeatedly referred to in the Commission's reports on reopening of March 4, 1946, and April 11, 1949, which the Three-

Judge District Court by its judgment of November 29, 1949, has set aside, annulled, and permanently enjoined. With respect to Motor Transit and as applied to it, this change of policy came eight years after it had consummated the White transaction, and more than a year after consummation of the Frederickson transaction. The report and order of March 4, 1946, were the first notice that Motor Transit had that this new policy would be applied to it in connection with the certificates acquired from the White companies and Fredericksons.

The essential facts are not controverted, and with the exception of damage and injury to Motor Transit which would result if the condemned orders should be made effective and enforced, are evidenced by the records of proceedings before the Commission and offered before the Three-Judge District Court in this case.

The Three-Judge District Court correctly decided that—

(1) The operating rights acquired by Motor Transit, and the certificates evidencing such rights, obtained in pursuance of final orders of the Commission of April 1, 1938, in Docket No. MC-F-445, and November 28, 1944, in Docket No. MC-F-2327, are in the nature of franchise rights and can only be changed or revoked as provided by law; and the only basis for a change or revocation in whole or in part of White Line's rights must be found in Section 212(a), Part II of the Interstate Commerce Act, 49 Stat. L. 555, 49 U.S.C., Section 312(a). *U. S. and I. C. C. v. Seatrail Lines*, 329 U. S., 424; *Boulevard Transit Lines v. U. S. et al.*, 77 Fed. Supp., 594; *Smith Bros. Revocation of Order*, 33 M.C.C. 465. No such basis is here present or shown.

(2) Motor Transit is a common carrier by motor vehicle within the definition of Paragraph 14 of Section 203(a) of Part II of the Interstate Commerce Act, with authority to hold itself out to the general public to engage in transportation by motor vehicle of prop-

erty for compensation. *U. S. v. Carolina F. C. Corporation*, 315 U. S. 475, at page 483.

(3) The Commission erred by its report and order of April 11, 1949, here challenged, in assuming that it has the power to burden Motor Transit's certificates with the restrictions noted. The Commission in acquisition cases, such as are now before the court, was without power to go beyond the findings required by Section 213 of the Motor Carrier Act of 1935 and its re-enacted provisions in Section 5(2)(a)(b) of the Interstate Commerce Act. Those findings were appropriately made in the Commission's orders of April 1, 1938, in MC-F-445, and November 28, 1944, in MC-F-2327, approving the White and Frederickson transactions and represented finality of action. *Seatrain Lines, Inc. v. United States*, *supra*.

(4) The proposed restrictions would materially change the character of Motor Transit's operating authority and impair its ability to fulfill the obligations of a common carrier as defined in Section 203(a)(14). *U. S. v. Carolina F. C. Corporation*, *supra*; *Alton R. Co. et al. v. U. S.*, 315 U. S. 15.

(5) Being an agency of limited powers and authority, the Commission may not exceed its statutory powers. Justification for the Commission's exercise of its administrative processes and authority must be found in some express provision of the Interstate Commerce Act. *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465.

(6) The proceedings covered by the Commission's orders of March 4, 1946, and April 11, 1949, upon re-opening, were reopened to execute a new policy. This action of the Commission results in a material change in Motor Transit's certificates and operating rights, and operates to revoke in whole or in part such certificates and operating rights. The Commission's action in this respect is unlawful. *I. C. C. v. Seatrains Lines*, *supra*; *United States v. Pennsylvania R. Co.*, *supra*; *I. C. C. v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479.

(7) Motor Transit's certificates and operating authorities are rights with very definite values. The Commission's action, in attempting to revoke a substantial portion of such certificates and operating rights will destroy or materially impair their value. Certificates such as here involved are entitled to constitutional protection. The Commission's order violates the Fifth Amendment to the United States Constitution. *City of Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Frost v. Corporation Commission*, 278 U. S. 515; *United States v. Seatrail Lines, Inc.*, supra.

Appellees submit that this appeal involves no substantial questions. Appellants' arguments as revealed by its jurisdictional statement are simply reiterations of arguments rejected by the Three-Judge District Court. It is respectfully submitted that the judgment and decree of the Three-Judge District Court should be affirmed:

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**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1950.**

**NO. 25.**

**THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,**

*Appellants,*

*vs.*

**THE ROCK ISLAND MOTOR TRANSIT COMPANY, STATE  
OF IOWA, EX REL. IOWA STATE COMMERCE COM-  
MISSION, AND THE OMAHA CHAMBER OF COMMERCE,**

*Appellees.*

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS.**

**BRIEF ON BEHALF OF THE STATE OF IOWA, EX  
REL. IOWA STATE COMMERCE COMMISSION,  
APPELLEE.**

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**I.**

**OPINION BELOW.**

The opinion of the Three-Judge Statutory Court from which this appeal is taken is reported in 90 Fed. Supp. 516, and it, together with the findings of fact and conclusions of law is reproduced in the printed record at pp. 204-221.

The challenged report and order of the Commission of March 4, 1946, and the Commission's affirming report and order of April 11, 1949, also here challenged, are reported, respectively, at 40 M.C.C. 457, and 55 M.C.C. 567, and are reproduced, respectively, at pp. 56 and 88 of the printed record. The original report and order of the Commission in the *White Line* case, approving appellee's acquisition of White Lines' certificates and operating rights, are reported in 5 M.C.C. 451, and are set forth at pp. 26-36 of the printed record. The original report and order of the Commission approving appellee's acquisition of Frederickson's certificate and operating rights are mentioned in 39 M.C.C. 824 by reference note, but are reproduced in full at pp. 47-55 of the printed record.

## II.

### STATUS OF STATE OF IOWA.

The Motion of the State of Iowa Ex Rel. Iowa State Commerce Commission for leave to intervene filed September 26, 1949, appears in the printed record at p. 143.—

The complaint in intervention appears in the printed record at p. 147 and the order of the Court granting leave to intervene appears at p. 153 of the printed record.

## III.

### CONCLUSION.

The State of Iowa Ex Rel. Iowa State Commerce Commission as appellee in this proceeding affirms the position taken in said motion and complaint in the court below and

concur in the brief filed herein on behalf of the Rock Island Motor Transit Company, appellee.

Respectfully submitted,

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October Term 1950

UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,

*Appellants,*

vs.

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ET AL,

*Appellees.*

**BRIEF OF OMAHA CHAMBER OF COMMERCE,  
INTERVENER IN SUPPORT OF APPELLEES'  
MOTION TO AFFIRM**

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**BRIEF OF OMAHA CHAMBER OF COMMERCE,  
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MOTION TO AFFIRM**

---

**STATEMENT**

Intervener, The Omaha Chamber of Commerce, is a nonprofit corporation having among its three thousand members, shippers and carriers as well as other classifications. It has among its many functions those usually found in a Chamber of Commerce, including a Transportation Department. The Transportation Department of the Intervener is responsible for assisting in securing and maintaining good transportation of all kinds and of all nature

at a reasonable rate. Its interest in this proceedings is to see that no less service is available to the public than was previously available. Hence, a petition of intervention was filed to support the position of the appellee, The Rock Island Motor Transit Company, herein called Transit, in the original action before the Interstate Commerce Commission, and was continued before the three-judge Federal District Court, and now files its brief herein.

The Omaha Chamber of Commerce, intervener, located at Omaha, Nebraska, has been vitally concerned in the ability of appellee, The Transit Company, to render service as a common carrier by motor vehicle. That this statement is correct is evidenced by the fact that this appellee-intervener has participated in all proceedings before the Commission involving purchase of the White Line and Frederickson rights.

The issue before this Court is that the Interstate Commerce Commission has exceeded its authority to amend the Certificate that was issued under date of **April 1, 1938** (M. C.-F445), a period of over eleven years.

The Interstate Commerce Commission contends that it has the power to "modify" its **original order**.

---

### FACTS

The Interstate Commerce Commission in its order of April 11, 1949, seeks to "modify" its original order. This order of April 11, 1949, seeking a "modification" of its original order is without statutory foundation. For a period of over eleven years appellee, The Transit Company, has been performing service as a common carrier

by motor vehicle at all motor rates as well as in coordination with its railroad affiliate. The Interstate Commerce Commission now seeks in substance a partial revocation of the rights of said appellee as a common carrier by prohibiting the use of all motor rates and imposing key point restrictions.

Such a "modification" order will adversely affect the Omaha, Nebraska, shipping and freight receiving interest represented by appellee-intervener, because:

1. Today the shipping and receiving public enjoy a motor carrier service by appellee, The Transit Company, broader than will be available if the proposed restrictions should become effective.

2. The "modification" order of the Interstate Commerce Commission will **nullify** all motor rates by said appellee, i. e., rates now published for itself and jointly in connection with other common carriers by motor vehicle, thereby depriving the shipper of said appellee's use of local and joint rates as a common carrier by motor vehicle.

Since April 1, 1938, said appellee under final order in Docket No. MC-F445, has been acting as a common carrier by motor vehicle in accordance with the Certificate it had acquired and in conformity with the Interstate Commerce Act. What the Interstate Commerce Commission is attempting to do is in direct conflict with Section 212 of the Interstate Commerce Act. Section 212 limits the power of the Commission to modify a certificate to the causes therein set forth. The Commission in this case admits it is not acting in accordance with that section.

In this case the theory of the commission seems to be that a Certificate granted today is subject to change at its pleasure; that a Certificate granted today five or ten years hence, should be thus and so, that is something less than when originally granted. The effect of such an attitude places a carrier in the difficult position of deciding whether it can safely make any capital investments to improve facilities and service. Yet under the proposed order this would be the result.

---

### ARGUMENT

It is the appellee-intervener's position that if it acts within Section 212 the Commission is without authority to "modify" the authority heretofore granted to appellee. The decision of the *United States Supreme Court* in *U. S. v. Seatrain Lines*, 329 U. S. 424, 91 L. Ed. 39, is applicable to this case and we contend is controlling; also the decision of the United States District Court of New Jersey in *Boulevard Transit Lines v. U. S.*, 77 Fed. Sup. 594, in which that court found that the Commission lacked authority to modify and revoke a certificate except under Section 212.

Commenting further on the *Seatrain Lines*, *supra*, it will be noted that the facts of the Transit Case are parallel. A certificate was issued. A year and a half later after confirming authority, the Commission on its own motion ordered proceedings to be reopened for the purpose of determining whether the Certificate should be "modified" so as to eliminate the carrying of commodities generally.

*Seatrain* appeared and moved to vacate and rescind the order reopening based upon the facts that the Com-

mission was without authority. Motion was denied. Hearing was set. Seatrain based its argument upon the Commission's lack of authority to alter or modify the original certificate. After hearing arguments the Commission entered an order cancelling the original certificate and issued a different one depriving the Seatrain of the right to carry goods, generally restricting Seatrain to operation of empty and loaded railway cars of liquid cargoes. Seatrain brought a bill for injunctive relief in a three-judge Court.

One of the outstanding differences between the Seatrain and Transit Case is that the Commission **waited nearly eight years** seeking to modify its original certificate.

The Seatrain had expended large sums of money same as appellee, Transit Company, to improve its equipment and terminals.

In *Boulevard Transit Lines vs. U. S.*, 77, Fed. Sup. 594, decided there was a lack of power of the Commission to "modify" and revoke a certificate, furthermore, the Court said that the Commission is without authority to modify or revoke a certificate once it has been issued, unless it comes within the provisions in Section 212 (a) of the Act. This case parallels the Seatrain case in that Interstate Commerce Commission seeks to "modify" its order.

Respecting the proposed rate restriction, at the time the Transit consummated the purchase of the White Line on April 5, 1938, and the J. H. and D. H. Frederickson on November 28, 1944, the Commission had in effect its Special Circular M-No. 1, which stated that when a change of ownership, including its operating rights, is

transferred to another common carrier, the successor shall file with the Interstate Commerce Commission an Adoption Notice which in substance provides that the adopting carrier ratifies and makes its own, in every respect as if the same had originally been filed and posted by it, such as tariffs, rules, classifications, agreements, rates, powers of attorney, etc. This appellee, Transit, did after the consummation of each transaction when it acquired the White Lines and the J. H. and D. H. Frederickson Companies. Said appellee complied with this Special Circular M-No. 1 indicating to the Commission that it was going to operate as a common carrier by Motor Vehicle. The commission accepted that carrier's Notices of Adoption and was of course on notice of the type of service that was to be rendered.

The Commission had the power then to accept or reject the adoption notices **if not in conformity** with its Special Circular M-No. 1.

We quote below Commissioner Porter and Mahaffie dissenting in regard to the rate situation (MC-F445):

"We concur in Commissioner Miller's (who also dissented) separate expression, except the suggestion that authority in the future, be limited to traffic which moves at rail rates and rail billing. We do not agree with this because when there is a difference between motor carrier rates and rail rates, **this limitation would tend to aggravate differences between those motor carriers which are subsidiaries of railroads and those which are not (R. 81).**" (Emphasis added.)

The proposed rate restriction would only create chaos for the shipping public being served by this motor carrier.

We also quote from Commissioner Miller's dissenting opinion (MC-F445):

**"Eight years ago we approved and authorized the purchase by Transit of operating rights of White then claimed under the 'grandfather' clause. In doing so we found that Transit proposed to render, under the acquired rights, an all truck service between points also served by the trains of its parent railroad company, as well as a truck service coordinated with that train service. \* \* \* also without restriction as to the kind of service authorized. For eight years Transit has rendered motor carrier service under those rights without question that it was rendering lawfully authorized service."** (Emphasis added.)

Further on Commissioner Miller stated:

**"The Carriers and the Public generally should not be forced to read into our reports intentions which are not clearly stated therein, or to anticipate that, years after we have given our approval without stating what we mean."**

And again,

**"We have permitted these carriers to invest their funds in acquiring definite operating rights, unrestricted as to the kind of service authorized." (R. 81-85.)** (Emphasis added.)

The facts in this case are not in serious dispute. Two certificates of convenience and necessity were issued to White Line Motor Freight and one Fredrickson. The service was general commodities between Omaha, Nebraska, and Chicago, Illinois, including towns therein between, and generally paralleled the rail line of Transit's parent. Transit, by proper application and hearing, became the holder of these certificates of public convenience and necessity, with certain modifications not here important. The Inter-

state Commerce Commission did, however, attempt to keep the door open for a further and future limitation of the certificate of convenience and necessity by inserting the following:

“(3) That the authority herein granted shall be subject to such further limitations, restrictions or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition. \* \* \*”

The Interstate Commerce Commission attempted to reopen the issue as a result of the aforesaid quotation and issued a new and different certificate greatly reducing the authority originally granted to Transit. As a result thereof, this Court now has before it the following questions:

(a) Can the Interstate Commerce Commission place such a burden upon an existing certificate of public convenience and necessity in a transfer case?

(b) Can the Interstate Commerce Commission recall a certificate of convenience and necessity once it has been established and become final and change its terms and conditions, except for the reasons and in the manner provided by the Motor Carrier Act?

The effect of the order of the Interstate Commerce Commission in this case was a rewrite of the certificate of convenience and necessity issued to Transit. (Sec. 206, U. S. Code, Tit. 49, Sec. 306.) This section provides for the issuance of certificates of convenience and necessity, and except for those operators operating on the grandfather date, June 1, 1935, a proposed carrier must satisfy the Interstate Commerce Commission that present and

future public convenience and necessity require the service the applicant proposes.

The certificates of convenience and necessity here under discussion were issued as a result of a grandfather application to the Interstate Commerce Commission. The Interstate Commerce Commission permitted Transit to purchase the certificates of convenience and necessity as issued under grandfather applications which, for all intents and purposes, were the same as those held by the predecessors, White Line Motor Freight and Fredrickson. The Interstate Commerce Commission now attempts to use the additions made to the certificate at the time of the transfer to reopen the certificate of convenience and necessity case in chief and to rewrite the certificate of public convenience and necessity that has already been issued.

It is elementary that the only authority held by the Interstate Commerce Commission is that authority it received from Congress. The Interstate Commerce Commission possesses no inherent powers to legislate. This the commission itself has admitted.

"But in ruling upon its petition to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier certificate, which reads and is specifically set out in paragraph 212 (2), it cannot revoke such a certificate under its general statutory power to alter orders previously made."

Smith Bros. Revocation of Order, 33 M. C. C. 465.

The Interstate Commerce Commission tried to rewrite the certificate of convenience and necessity issued to Seatrain Lines, Inc., and this Court, in reviewing that

case, held in *U. S. v. Seatrain Lines, Inc.*, 329 U. S. 424, which was quoted with approval by the United States District Court in New Jersey in a similar case where the Interstate Commerce Commission attempted to rewrite a certificate previously issued, as follows:

"This certificate was final and the Commission could not revoke or amend it save under the provisions of 49 U. S. C. A. 312(a), nor can we make a rule controlling the Commission on this point. Nothing herein indicates the presence of the conditions under which that section may be invoked."

*U. S. v. Seatrain Lines, Inc.*, 329 U. S. 424.

*Boulevard Transit Lines v. U. S.*, 77 F. Supp. 594-595 (1948).

The Interstate Commerce Commission having only such authority as is given to it by Congress and lacking the statutory authority to include in a certificate of convenience and necessity the language included herein, it cannot rewrite such a certificate of convenience and necessity at a future date except in the manner as by law provided.

---

### CONCLUSION

It is, therefore, respectfully submitted that the motion to affirm the decision of the United States District Court should be sustained.

Respectfully submitted,

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R. H. HEINECAMP, Of Counsel.

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**HARRY E. BOE,  
MARTIN L. CASSELL,**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950.

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**No. 25.**

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THE UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,

*Appellants,*

*vs.*

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
STATE OF IOWA, EX REL. IOWA STATE COM-  
MERCE COMMISSION, AND THE OMAHA CHAMBER  
OF COMMERCE,

*Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS.

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**BRIEF ON BEHALF OF THE ROCK ISLAND MOTOR  
TRANSIT COMPANY, APPELLEE.**

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**I.**

**OPINIONS BELOW.**

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The opinion of the Three-Judge Statutory Court from which this appeal is taken is reported in 90 Fed. Supp. 516, and it, together with the findings of fact and conclusions of law, is reproduced in the printed record at pp. 204-221.

The challenged report and order of the Commission of March 4, 1946, and the Commission's affirming report and order of April 11, 1949, also here challenged, are reported, respectively, at 40 M.C.C. 457, and 55 M.C.C. 567, and are reproduced, respectively, at pp. 56 and 88 of the printed record. The original report and order of the Commission in the *White Line* case, approving appellee's acquisition of White Lines' certificates and operating rights, are reported in 5 M.C.C. 451, and are set forth at pp. 26-36 of the printed record. The original report and order of the Commission approving appellee's acquisition of Frederickson's certificate and operating rights are mentioned in 39 M.C.C. 824 by reference note, but are reproduced in full at pp. 47-55 of the printed record.

## II.

### JURISDICTION.

The final judgment order of the Three-Judge District Court was entered on November 29, 1949. (R. 221, 222.) The petition for appeal was presented and allowed on January 27, 1950. (R. 222, 223.) Probable jurisdiction was noted on March 27, 1950. (R. 646.) Appellants invoke the jurisdiction of the Supreme Court under Title 28 U. S. Code, Sections 1253 and 2101(b). Appellee admits that these sections apply.

## III.

## STATUTE INVOLVED.

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The statute involved is Part II of the Interstate Commerce Act, which is also known as the Motor Carrier Act of 1935, and particularly Section 213 thereof, as relates to the White Line transaction, and as relates to the Fredrickson transaction, the re-enacted provisions of Section 213 as now set forth in Section 5(2)(a)(b) of the Interstate Commerce Act; and as to both transactions, Sections 203(14), 204(a)(1)(6), 206, 208(a), Sections 212(a), 216(b)(c), and 217(a) of said Act. Pertinent provisions of the Act are reproduced in the Appendix hereto. (Pages 84-91.)

## IV.

## QUESTION PRESENTED.

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At page 2 of their brief appellants state that the questions presented are similar to those raised in *United States, et al. v. The Texas & Pacific Motor Transport Company*, Nos. 38 and 39. There are some sharp differences in facts in our case (No. 25), hence this statement is not accurate. Appellants avoid a recognition of the application of Section 212(a) of the Interstate Commerce Act. More properly the ultimate question presented, as observed by the lower court, is whether the Interstate Commerce Commission has the power, apart from the provisions of Section 212(a), materially to change or modify, that is, partially to revoke, an outstanding certificate of public convenience and necessity lawfully acquired in appropriate

proceedings under the Act. Such change or modification would consist of two new conditions to be attached to appellee's certificate, and would work a drastic reduction in appellee's operating rights and privileges granted by the certificates acquired.

## V.

### STATEMENT:

At page 2 of their brief appellants state:

"The questions presented in this appeal are similar to those raised in *United States, et al. v. The Texas & Pacific Motor Transport Co.*, Nos. 38-39."

On page 9 under their "Summary of Argument," it is stated:

"Since the legal issues raised in this case are in our view identical with those of the *Texas & Pacific* case, Nos. 38 and 39, the Court is respectfully referred to the brief of the United States and the Interstate Commerce Commission in that case."

Likewise, at page 10 of the argument, counsel for the appellants again state that:

"We will not duplicate this material here but respectfully refer the Court to that discussion."

And at page 11 follow this with:

"These contentions have been answered fully in Point II of the brief of the United States and the Interstate Commerce Commission in *Texas & Pacific* case, Nos. 38 and 39. Since in our view the legal issues raised here are identical, we will not burden the Court with repetition but respectfully refer it to that brief."

Appellee did not receive a copy of appellants' brief in Nos. 38 and 39 until the day (October 25) our brief went to the printer. Under the rules of Court, appellants are required to serve appellee with a copy of their brief not less than three weeks prior to the time when the cause is set for argument. Appellants' brief in our case (No. 25) contains a most meager statement of facts. It contains no statement at all of the underlying facts in the *White Line* case, and those in the *Frederickson* case but sketchily. It omits facts which appellee maintains are material to a proper consideration of the questions presented. Further, appellants' brief in Nos. 38 and 39 contains no statement whatever of the facts in No. 25.

The effort of appellants' counsel to avoid particularly the facts in the instant case is understandable. It has such a closet of facts as would cause any one faced with them, as are appellants' counsel, to shudder. The instant case is not like the *Texas & Pacific* case, and although counsel have endeavored to close the door and quietly leave the room, the facts will out. Appellee is fortunate in being able to document the facts which are entirely omitted by appellants and which make this case stand apart from any other proceeding with which it might be compared. While it involves a "modifying" away of operating authority pursuant to a change of policy, as in the *Seatrains* case (*United States and Interstate Commerce Commission v. Seatrain Lines, Inc.*, 329 U. S. 424, affirming District Court's judgment, 64 Fed. Supp. 156), it is unusual in that, as to this appellee, the old policy need not be drawn by inference but may be taken from the positive expressions of the Commission itself.

The *White Line* case was initiated in 1937. From that time until March 30, 1945 (R. 493, 494), when the Commission's tariff section was required to tear out of its files tariffs already accepted, there was a consistent ad-

herence and assertion that the appellee's certificate gave it the right to transport not only at rail rates and on rail billing but also at truck rates and on truck billing; and there was no restriction of the movement from one end of the system to the other. Appellee is able to submit as its authority for this statement, not its own interpretation but expressions of Commissioners Mahaffie,\* Miller, Porter, Mitchell, Lee, and Rogers,\*\* and expressions of the Commission itself as a whole.† Even after establishment of the new policy, Commissioners Mahaffie, Miller, and Mitchell (the latter's predecessor, Commissioner Porter, being now deceased) in dissenting from the enjoined order of the Commission of April 11, 1949, affirmed the rights heretofore granted to appellee upon the premise that when policies are changed, they may be only prospective in effect and not applied retroactively to cancel out rights theretofore granted.‡ From the very inception the record of this appellee is clear.

As shown in this brief the question of the imposition of a restriction to rail rates and rail billing arose at the time of the White Line acquisition in April, 1938, and was rejected by appellee. Thereafter, the Commission consistently required appellee to keep on file motor carrier rates. Commissioners Lee and Rogers, then in the minority in their belief as to policy, objected to subsequent rights granted to appellee and dissented on the ground that such grants, coupled with the White Line rights, permitted appellee to do the very things the Commission would now have this Court believe were excluded. These facts are not present in

\* The striking dissents of Commissioners Miller, Mahaffie, and Porter are entitled to much weight, for they reveal an awareness of the unsoundness, not to say the gross injustice, of the order, on reopening, of March 4, 1946. We have taken the liberty of reproducing these dissents in full and earnestly invite the Court's consideration of them. (App. pp. 83-88.)

\*\* See pages 41 and 42 of this brief.

† See Topic III of this brief, pp. 38 to 46.

‡ This dissent is reproduced at App. pp. 85, 86.

the *Texas & Pacific* case. On the strength of these facts alone this case should be decided without the necessity of referring to the respective powers of the Commission. The facts peculiar to appellee's authority should wholly dispose of the contentions raised by appellants after eight years of operation by appellee upon the White Line routes as well as the Frederickson routes where there was an interval of more than a year before the Commission attempted to invoke the new policy.

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The following statement recapitulates the essential steps leading to this litigation. In so far as the reopened proceedings are concerned, they reflect a course of conduct by the Commission strikingly parallel with its action in the *Sea-train* case. The pattern is the same in two material respects, first, many months after final orders confirming the carrier's operating authority, the Commission reopened the proceedings in which the operating authority was acquired and proposed a substantial modification of the carrier's certificate of public convenience and necessity; and, second, as to the complaining carrier attempted to apply a change of policy with regard to the type of service\* permissible under its certificate.

Two acquisitions were involved in the reopened proceedings before the Commission, i.e., the White Line transaction (MC-F-445, R. 237-479) and the Frederickson transaction (MC-F-2327, R. 504-587). To appellee the White Line

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\* This has reference to imposition of the condition that appellee's service shall be "auxiliary to or supplemental of the service of its railroad affiliate," as redefined by the Commission in another case with which appellee had no identity or connection. *Texas & Pacific M. Transport Co., Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943. The Commission originated this term in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Freight*, 1 M. C. C. 101, 5 M. C. C. 9, and 5 M. C. C. 49. By the contested orders the Commission would also impose a "key-point" restriction, the vital effect of which is later detailed in this brief.

transaction is by far the more important. In the *White Line* case the attempted modification of the certificate came *eight years* after Commission approval of the acquisition, and in the *Frederickson* case more than one year after such approval.

### **Status of Appellee.**

Appellee, a corporation organized and existing under the laws of the State of Illinois, is a common carrier by motor vehicle of property, in inter- and intrastate commerce, with routes located in the States of Illinois, Iowa, and Nebraska, among other states into which lines of railroad of the Chicago, Rock Island and Pacific Railroad Company extend. Appellee has been in operation since April 1, 1938. At all times here involved it is and was a wholly owned subsidiary of said railroad company and predecessors in interest. In general, appellee's routes parallel the railroad of its affiliated rail carrier. (R. 16.)

### **White Line Transaction.**

White Line Motor Freight Company, Inc., and White Line Trucking Company (White Lines) of Des Moines, Iowa, were affiliated trucking companies operating as common carriers of property by motor vehicle and possessed of routes, among others, extending from Chicago, Illinois, to Omaha, Nebraska, and serving virtually all points on the Rock Island railroad between Silvis, Illinois, on the Mississippi River, and Omaha. White Lines were engaged in these operations for many years prior to April, 1938, at which time appellee took over said operations and since which time it has been in continuous operation upon these routes. White Lines had "grandfather" rights to the routes between Silvis, Illinois, and Omaha, Nebraska, under the proviso of Section 206(a) (App. p. 86) of the Motor

Carrier Act, which are the rights that are here involved, and which White Lines were in course of formally establishing (MC-29130, Application of The Rock Island Motor Transit Company; R. 38) in October, 1937, when appellee entered into a purchase agreement with White Lines to acquire these rights. (R. 243, 245.) After this agreement was executed appellee perfected these rights as White Lines' successor in interest, as evidenced by compliance order dated August 5, 1938, of the Interstate Commerce Commission. (R. 38-40.) This order defined the "grandfather" rights to which appellee was entitled. Compliance orders of the Commission formed the basis of the certificates of public convenience and necessity issued by the Commission evidencing a common motor carrier's operating authority under the proviso of Section 206(a) of the Motor Carrier Act. Such orders constituted the first formal recording by the Commission of the "grandfather" rights to which the carrier was entitled under that section of the law. The formal certificate itself, which also embraced other routes later acquired by appellee, was issued on December 3, 1941. (R. 40-43.)

In October, 1937, appellee entered into a purchase agreement with the holder of the controlling interest in White Lines (R. 243) pursuant to which, upon consummation and subject to approval of the Interstate Commerce Commission, appellee would acquire for the sum of \$59,000.00, the operating rights of White Lines between Chicago and Omaha. The proposed transaction required the approval of the Commission under Section 213 of the Motor Carrier Act of 1935, U. S. Code, Title 49, Section 313. (App. pp. 89 and 90.) Appellee accordingly filed its application with the Commission in October, 1937, for authority to acquire the operating rights and properties of White Lines. The application was docketed as number MC-F-445 and assigned to an examiner of the Commission for hearing. After hearing,

on February 12, 1938, the examiner filed a proposed report and order (R. 17-26) recommending that the transaction be approved subject, among other conditions not here pertinent, to the following conditions:

(1) That applicant shall not render service from or to, or interchange traffic at, any point other than The Chicago, Rock Island and Pacific Railway Company, and shall be subject to such further limitations as may hereafter be found necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition; and

(2) That no truck service shall be conducted at other than rail rates. (R. 24, 25.)

Appellee filed exceptions to the examiner's recommended report and order, taking particular exception to the imposition of condition number 2, that no truck service should be conducted at other than rail rates. In its Brief of Exceptions (R. 454-467) appellee advised the Commission that, among other types of service, it proposed to utilize the operating rights of White Lines in the conduct of an all-truck service confined to points on the railroad "but in addition to rather than a substitute for rail service"; that any prohibition against the conduct of truck service at other than rail rates would so substantially impair the value to appellee of the operating rights and physical property sought to be acquired as to question the propriety of the investment to which appellee had tentatively been committed; and that if the authority granted was so restricted as not to permit truck service at motor common carrier rates appellee would abandon the transaction.

Appellee made clear in the following language that it would not consummate the transaction if the rate restriction recommended by the examiner stood:

"Applicant represents that the recommended restriction that it be permitted to acquire the operating

rights and physical properties of White Line Motor Freight Company, Inc., and White Line Trucking Company, only if rail rates are applied in the performance of motor carrier service, is unwarranted and will so substantially impair the value of those physical properties and operating rights to the applicant and the trustees of The Chicago, Rock Island and Pacific Railway Company as to concern the propriety of the investment to which the applicant has tentatively been committed. Reluctantly, therefore, applicant will be obliged to conclude that, unless such a restriction be not imposed by the Commission as a condition precedent to acquisition, or unless a modification of such restriction as suggested by the applicant herein is acceptable, applicant must abandon this transaction." (R. 465, 466.)

The Commission considered appellee's exceptions to the examiner's report and on April 1, 1938, issued its report and order. (No. MC-F-445, *Rock Island Motor Transit Company—Purchase—White Line Motor Freight Company, Inc., et al.*, 5 M. C. C. 451.) (R. 26-36.) By said report and order the Commission approved the purchase by appellee of the operating rights covered by the agreement of October, 1937, including those rights here involved. Such approval was subject to prescribed conditions, ~~but did not include~~ condition number 2 which had been recommended by the examiner and to which appellee had objected "that no truck service shall be conducted at other than rail rates." The Commission eliminated that condition and its report and order of April 1, 1938, did not set forth any such restriction. Following the issuance of the Commission's report and order, appellee was required by the rules\* of the Commission, upon consummation of

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\* As a condition precedent to consummation appellee was required to take steps to "insure compliance with Section 217 of the Act, and with rules, regulations and requirements promulgated thereunder." (R. 35.) The rule itself requiring unconditional adoption of vendors' all-motor tariffs is found in Special Circular M No. 1. (R. 480.)

the proposed transaction, to adopt the common motor carrier rates and tariffs of White Lines. These are the "all-motor" rates which the Commission by its challenged reports and orders of March 4, 1946, (R. 56) and April 11, 1949, (R. 88) claims appellee had (and now has) no authority to use or apply in connection with the White Line operating rights acquired in pursuance of the enabling order of April 1, 1938, as confirmed by the compliance order of August 5, 1938, and as evidenced by the formal certificate of December 3, 1941.

In connection with the conduct of truck service from or to, or the interchanging of traffic at, any point not a station on the Rock Island railroad, appellee had advised the Commission in its Brief of Exceptions and at the hearing before the examiner that it was agreeable to abandonment of all rights that White Lines possessed (White Lines also having claimed "grandfather" rights east of Chicago, Illinois, which were beyond the rail territory of appellee's affiliated rail carrier—R. 489) *except common carrier operating rights at stations on the railroad between Omaha, Nebraska, and Chicago, Illinois, and similar rights over branch routes to Muscatine and Cedar Rapids, Iowa.* In its report and order of April 1, 1938, the Commission referred to this commitment by appellee and thereupon stated that "the 'grandfather' applications of White Lines will be considered as amended accordingly." In said report and order the Commission made the following findings among others:

(a) that the purchase by appellee of the *common-carrier operating rights of White Lines between Omaha and Chicago, and similar rights over branch routes to Muscatine and Cedar Rapids*, including the right to operate pending determination of the "grandfather" applications, and the right to any certificates which may be issued as a result of said applications, will promote the public interest by enabling the rail-

road to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(b) that appellee shall not render service from or to, or interchange traffic at any point other than a station on the lines of said Railroad.

(c) that the conditions of Section 213 have been or will be fulfilled. (R. 34, 35.) (Emphasis supplied.)

Relying upon the report and order of the Commission authorizing appellee to acquire the described physical properties and common carrier operating rights of White Lines, and upon the significant fact that the Commission did not impose as a condition of its approval the restriction recommended by the examiner to which appellee had expected, namely, "that no truck service shall be conducted at other than rail rates," appellee paid the purchase price and the transaction was consummated on April 5, 1938. Upon consummation appellee proceeded to engage and has continuously since engaged in the following methods of operation: (a) a coordinated motor service at rail rates auxiliary to the existing railway service of its railroad affiliate; (b) a motor carrier service in substitution of rail service, at rail rates; and (c) a motor carrier service at motor common carrier rates. The method referred to in item (c) is that which would be prohibited by the challenged orders of the Commission and that in which the Commission claims appellee never had authority to engage under the operating rights acquired by the order of April 1, 1938, in No. MC-F-445. In its report and order of April 1, 1938, the Commission made the statutory findings required by Section 213 of the Motor Carrier Act of 1935, *i. e.*, that this transaction was within the scope of said section and was being concluded upon just and reasonable terms; that the transaction would promote the public interest by enabling appellee's railroad affiliate to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition. (R. 34.)

### Frederickson Transaction.

J. H. and D. H. Frederickson were partners operating as a common carrier of property by motor vehicle upon routes located in western Iowa. So far as the rights involved in this proceeding are concerned, Fredericksons operated over a route or routes paralleling the Rock Island railroad between Omaha, Nebraska, and Atlantic, Iowa, and that railroad's branch lines extending to Avoca and Harlan, Iowa, and between intermediate points located on said railroad. (R. 16.) Fredericksons were possessed of a "grandfather" certificate. (Certificates issued June 7, 1941, and March 15, 1943, in Commission's Docket Nos. MC-530 and MC-530-Sub. No. 1; R. 49.)

On August 23, 1943, appellee entered into a purchase agreement which upon consummation would result in acquisition by appellee of certain equipment and the described operating rights possessed by Fredericksons. The agreed purchase price was \$6500.00. The proposed transaction was subject to the approval of the Commission under Section 5(2)(a)(b) of the Interstate Commerce Act, 54 Stat. L. 905; Title 49, U. S. Code, Section 5(2)(a)(b).<sup>\*</sup> In September, 1943, appellee filed its application with the Commission to acquire said certificate and operating rights. This application was assigned to an examiner for hearing, an examiner's report was waived, and on November 28, 1943, the Commission issued its report and order approving the transaction. (R. 47-55.) Upon consummation of this transaction appellee was required to adopt the motor carrier rates and tariffs of Fredericksons. By said report and order it was also stated that appellee would be

<sup>\*</sup> As amended by the Act of September 18, 1940, c. 722, Title I, Sec. 7, 54 Stat. L. 905, this section now embraces substantially the same provisions respecting acquisitions as were contained in former Sec. 213, which was repealed by the Act of September 18, 1940.

entitled to a certificate covering the operating rights acquired and as granted to Fredericksons, which rights were authorized to be unified with the rights otherwise confirmed in appellee. (R. 54.)

Relying upon the report and order of the Commission authorizing appellee to acquire the common carrier operating rights and properties of Fredericksons, appellee paid over the purchase price and consummated the transaction effective January 22, 1945. Appellee adopted the motor common carrier rates and tariffs of Fredericksons in the form and manner prescribed by the Commission's rules, and since that time and at present appellee, in the conduct of motor carrier operations, has been and is applying and observing said motor common carrier rates and tariffs as modified from time to time. (R. 480, 582, 583, 586, 587.) As in the case of the White Line route, appellee upon consummation of the Frederickson transaction proceeded to engage and has continuously since engaged in the three methods of operation as detailed above. (Page 13.) (Also, the Commission made the statutory findings required by Section 5(2)(a)(b) of the Interstate Commerce Act, that this transaction was within the scope of said section, that the transaction would promote the public interest by enabling appellee's railroad affiliate to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition. (R. 580.) Although the final order of the Commission of November 28, 1944, determined that appellee was entitled to acquire the Frederickson certificate and operating rights (R. 54), the formal act, of reissuing in appellee's name the acquired Frederickson certificate, has not been accomplished, presumably awaiting the outcome of this litigation. Said final order required appellee to exercise the authority, i.e., consummate the transaction within 180 days from November 28, 1944; otherwise the order would have no force or effect. (R. 55.)

The exercise of the authority granted *was not contingent* upon the formal act of transferring the Frederickson certificate, and the Commission's order of November 28, 1944, was final in nature. (R. 54, 55.)

### **The Reopened Proceedings.**

We now discuss the events which, so appellee maintains, reflect erroneous proceedings of the Commission. These are the proceedings of which appellee complains and which culminated in the report and order of April 11, 1949 (R. 88-128), by which the Commission attempts a modification of appellee's certificates and operating rights as acquired from White Lines and Fredericksons. The judgment order (R. 221, 222) entered by the Three-Judge District Court enjoins said report and order of the Commission, and this is the judgment order from which appellants have prosecuted this appeal.

Upon its own motion, and upon present (that is, the original) records, the Commission on February 5, 1945, reopened Docket No. MC-E-445, the *White Line* case, Docket No. MC-F-2327, the *Frederickson* case, and Docket No. MC-29130, the last being the proceeding in which the "grandfather" rights of appellee as White Lines' successor in interest were determined. (R. 588.) In its report and order\* of March 4, 1946, on reopening, the Commission said:

"\* \* \* to enable us to examine the matter further, by an order entered February 5, 1945, we reopened No. MC-F-2327, also Transit's original application No. MC-F-445, and No. MC-29130 to the extent it embraces operating rights acquired pursuant to order entered in No. MC-F-445, for reconsideration on the present

\* Two Commissioners concurred in the majority report; three Commissioners dissented, Commissioner Miller filing a sharp dissent. (R. 81.) (App., pp. 79 to 83.)

records, solely to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor-carrier service performed by Transit is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the condition, if any appears necessary, which should be imposed to make the authority granted to Transit subject to such further conditions or restrictions as we may find necessary to impose in order that the service shall be auxiliary to, or supplemental of, rail service." (R. 59, 60.)

The reopening and reconsideration were on the records as originally made eight years previously in the *White Lines* case and more than one year previously in the *Fredrickson* matter following the Commission's final orders in MC-F-445 of April 1, 1938, and in MC-F-2327 of November 28, 1944. Pursuant to said report and order of March 4, 1946, the Commission proposed to modify and amend appellee's certificates and operating authorities by two new vital restrictions, as follows: (a) that transportation over the routes in question shall be conducted only at the rail rates and on the rail billing of appellee's railroad affiliate, and (b) that no shipments shall be transported between any of specifically named points, or through, or to, or from, more than one of such points, this being known as a key-point restriction. These restrictions would result from the imposition by the order of March 4, 1946, of two new conditions, i.e.—

No. 1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of train service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Railway.

No. 3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points, Omaha, Nebraska, Des Moines,

Iowa, and collectively Davenport and Bettendorf, and Rock Island, Moline, and East Moline, Illinois. (R. 80, 81.)

The restriction against "all-motor service" (mentioned, for example, at R. 74 in the third line from the bottom of the page, R. 77 in the fourth line, and R. 78 in the twenty-second line) would be justified by the Commission under condition number 1.\* Its report and order of April 11, 1949, affirming the action reflected by its report and order of March 4, 1946, stated the meaning of the term "auxiliary to, or supplemental of train service of the railway," was "spelled out in greater detail" in *Texas & Pacific M. Transport Co., Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943, to which reference is made in said report and order of April 11, 1949. (R. 109, last five lines, and R. 110.) This "spelled out" meaning, appellee maintains, was really a different and changed meaning from that which obtained in April, 1938, when the White Lines transaction was consummated. It first became evident, so far as appellee is concerned, from the action of the Commission in one of appellee's acquisition cases by the Commission's reversal of position when it refused to receive appellee's "all-motor" tariffs.\*\* Prior to the advice of

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\* The significance of the term "all-motor service" was readily recognized by Commissioner Miller in his dissenting opinion:

"The majority report leaves no doubt that this restriction is intended to deprive Transit of the right to engage in operations unconnected with the rail service, of the right to be a party to tariffs containing all-motor or joint rates, and of the right to transport freight at other than the rail rates of its parent." (R. 82.) (App., p. 80.)

\*\* Communication dated March 30, 1945, from the Commission's Assistant Director of Traffic, reading in part as follows:

"I regret to inform you that I was in error in requesting your company to file these adoption notices. I overlooked the fact that under the principle laid down by the Commission in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, a motor carrier whose operating authority is restricted to service which is auxiliary to

March 30, 1945, from the Commission's Assistant Director of Traffic, so far as appellee's acquisitions were concerned, the Commission had consistently required appellee to adopt the motor rates of the vendor motor carriers whose operating authorities appellee had purchased.† Actually, the changed meaning reflected a change in policy.

Following the report and order of March 4, 1946, appellee filed a petition for reconsideration objecting to the reopening of the case and seeking withdrawal of said order, appellee's position being that the Commission was without jurisdiction to change or modify its final orders of

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or supplemental of rail service, without other qualifications, may not perform service under all-motor local and all-motor joint rates with connecting motor carriers, and accordingly may not maintain or be a party to tariffs containing all motor rates." (R. 494.)

† In all instances in the following cases, appellee was required to adopt the vendor's motor rates: Adoption notices—

Filed July 2, 1938, adopting Burlington Transportation Co., tariffs.

Filed May 8, 1939, adopting Harold L. Clark, dba Clark Transportation, tariffs.

Filed August 1, 1939, adopting George H. Swaim, dba Interstate Express Company, tariffs.

Filed August 4, 1939, adopting William F. Peterson, dba A and A Truck Lines, tariffs.

Filed March 15, 1941, adopting Clinton, Davenport & Muscatine Railway Company, tariffs.

Filed March 27, 1941, adopting E. R. Brillhart and Pearl Frank, Administratrix of the Estate of George Frank, deceased, dba Atlantic Motor Freight, tariffs.

Filed May 13, 1942, adopting Fred E. Rees, dba Whiting Motor Service, tariffs.

Filed April 2, 1943, adopting Philip Erickle, tariffs.

Filed April 1, 1944, adopting A. B. Corpier, dba Corpier Truck Line, tariffs.

Filed April 1, 1944, adopting Boyd Amos Corpier, dba Boyd Corpier Truck Line, tariffs.

Filed April 1, 1944, adopting Art Lucke and Charles Hearn, dba Northwest Kansas Freight Lines, tariffs.

(These adoption notices were included in appellee's Exhibit No. 1 but are not reproduced in the printed record. Parties have stipulated (R. 464) that either may refer to any original exhibit included in the record filed in this court.)

April 1, 1938, and November 28, 1944, authorizing, respectively, acquisition of the White Line and Frederickson certificates. (R. 92; 624-627.) Notwithstanding appellee's objection, the Commission assigned the reopened proceedings for hearing and further proceedings were conducted before an examiner at Chicago, Illinois, on October 9, 1947. (R. 628-638.) At this hearing before the examiner appellee entered a special appearance and restated its contention that the Commission was proceeding illegally and renewed the prayer of its petition for reconsideration that the reopened proceedings be discontinued and terminated. (R. 631-633.) No evidence was offered at this hearing by the Commission, by appellee or by any of the other parties who entered appearances.\* Thereafter, on April 11, 1949, the Commission entered its further report and order\*\* affirming its prior report of March 4, 1946, in the proceedings reopened upon its own motion. (R. 88-128.) The Commission adopted its said prior report in full in the following decisive language:

"No new or additional evidence having been received as a result of the further hearing, the only issue now before us is the question whether the reasoning of our prior report on reconsideration and the conclusions there reached are sound in the face of the criticisms thereof contained in Transit's petition. We shall not burden this report with a complete repetition of the discussion in the prior report. We have, however, carefully reviewed that report and find no occasion to revise materially anything that was said

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\* Two motor common carriers, as their "interests may appear"; and Regular Common Carriers Association. The appearances of Regular Common Carriers Association and one of the motor carriers were obviously in support of the Commission's action. (R. 630.)

\*\* Commissioners Miller and Mahaffie, who had dissented to the prior report and order, again dissented. Commissioner Porter, who had also dissented, was now deceased. His successor, Commissioner Mitchell, joined in the dissent to the report and order of April 11, 1949. (App., pp. 83 and 84.)

there. Our discussion therein of the fundamental issues presented is accordingly reaffirmed and reference is made to it for the fundamentals of the issues presented." (R. 94.)

The report and order of April 11, 1949, restated much of the discussion appearing in the report of March 4, 1946, and, further, undertook to dispose of various arguments advanced in appellee's petition for reconsideration in opposition to the reopened proceedings.

### **Damage and Injury to Appellee.**

With respect to the damaging effect which the proposed modifications of its certificate would have upon appellee's business and operations, appellee alleged in its complaint in the lower court that such modifications would eliminate appellee's participation from a class of traffic that as to these routes had produced gross revenues in excess of one million dollars in the year 1948; that in reliance upon the final orders of the Commission of April 1, 1938, in the *White Line* case, and of November 28, 1944, in the *Fredrickson* case, appellee not only paid substantial purchase prices for the rights and properties acquired from its predecessors in interest but also assumed and committed itself to assume large expenditures in providing adequate facilities and equipment for the conduct of its business; and that withdrawal from the handling of traffic in all-motor service and being confined to a key-point operation would necessitate the dismissal of approximately ninety-six employees involving an annual payroll of more than \$334,000.00. (Complaint, Paragraph X; R. 9-12.) These allegations were not specifically denied in the answer of the Commission, but were generally denied in the Government's answer. (R. 128, 133.) In view of the court's indication that specific proof of damage was unnecessary,

and the recognition in the colloquy between court and counsel that damage and injury to appellee would result from the proposed modification of its certificate, particular proof of these allegations was not made in the interest of expediting the submission of the case. (R. 167-169.) When the Commission issued its report and order of affirmance on April 11, 1949, it had before it the substance of these allegations as drawn from appellee's petition for reconsideration filed after the Commission's challenged report and order of March 4, 1946, were entered. (R. 112.)

## SUMMARY OF ARGUMENT.

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1. Appellee acquired the certificates and operating rights, which the Commission now seeks to modify, in appropriate proceedings under the Interstate Commerce Act. Upon consummation of the transactions, as approved by the Commission, appellee became authorized to conduct operations as a common carrier by motor vehicle upon the routes and in accordance with the operating rights acquired from White Lines and Fredericksons. Now, however, through the medium of newly imposed conditions to be added to appellee's certificate as proposed by the orders of March 4, 1946, and April 11, 1949, after reopening the original proceedings upon its own motion and upon present records, the Commission would drastically curtail the operations of appellee as such a carrier. In other words, eight years after approval of the White Line acquisition and more than a year after approval of the Frederickson transaction, the Commission is attempting to qualify its earlier final orders and the certificates acquired in pursuance thereof which authorized appellee to conduct operations as such a carrier.

2. The certificates and operating rights which appellee was authorized to purchase from White Lines and Fredericksons included the right to engage in the forms of trucking service upon the acquired routes which the Commission by the enjoined reports and orders would now prohibit. The result of the proposed restrictions would be seriously to cripple appellee's operations as a motor common carrier. In the proceedings before the Commission leading to the orders of approval of April 1, 1938, and November 28, 1944, authorizing acquisitions of the motor routes of the aforesaid motor carriers, appellee clearly showed that it intended to engage in operations

as a common carrier by motor vehicle in the methods which the Commission would now forbid.

3. At the time of the approval of the White Line and Frederickson transactions, the term, "auxiliary to and supplemental of train service," did not prohibit the rendition by appellee of an all-motor service. The term, "auxiliary to or supplemental of train service," is not statutory language, and is terminology of the Commission's own creation. The statutory findings required by Sections 213 and 5(2)(a)(b) of the Interstate Commerce Act, pursuant to which appellee acquired the White Line and Frederickson operating rights, do not use that term.

4. The proposed rate restriction would be repugnant to the mandatory as well as the permissive provisions of Sections 216 and 217 of Part II of the Act. The Commission's action on reopening of the proceedings, in order to restrict appellee to the rail rates of its affiliated rail carrier, reveals a misconception of its powers when it attempts to impose this restriction upon appellee's acquired certificates permitting it to exercise the privileges of a common carrier by motor vehicle.

5. Part II of the Interstate Commerce Act provides only one method for modifying or ~~revoking~~ certificates of common carriers by motor vehicle, viz., procedure in accordance with Section 212. Here the Commission admits that in imposing the new restrictions it is not acting within the scope of Section 212. It has reopened the proceedings to execute a new policy. Unless the Commission acts within the provisions of that section it is without authority to modify or revoke a certificate.

6. It is abundantly evident from the record that in both the White Line and Frederickson acquisitions appellee sought and obtained the right to carry all-motor freight as well as the right to carry the freight of its railroad affiliate at rail rates. The proposed restrictions would consti-

tute a substantial diminution of appellee's certificate and operating rights and would constitute, in whole or in part, a revocation of its certificate and operating rights.

7. There are limitations upon the Commission's power to impose conditions. Justification of the Commission's exercise of its administrative processes must be found in some express provision of the Interstate Commerce Act. Here the Commission is disregarding the limitations upon its power to regulate appellee's service.

8. Appellants' assertion that the proposed action of the Commission finds approval in this Court's decision in *Interstate Commerce Commission, et al. v. Harry A. Parker, etc.*, 326 U. S. 60, decided June 18, 1945, is in error. Appellee submits that that case differs in material respects from the instant proceeding and cannot properly be construed as a parallel case.

9. In asserting that the Commission is merely carrying out the legislative intent in its attempt to prohibit appellee from rendering an all-motor service in addition to that which is directly coordinated with its affiliated railroad, appellants are also in error. In the hearings on the bill which materialized into Part II of the Interstate Commerce Act, the chairman of the legislative committee of the Interstate Commerce Commission stated that it was the unanimous recommendation of the Commission that railroads, "like any one else," should be given certificates of public convenience to operate competing bus and truck lines.

10. In revoking a substantial portion of appellee's certificate, the value thereof will be destroyed or materially impaired. Appellee's certificate is a right with very definite value. The rights conferred under a certificate represent property of value and are entitled to constitutional protection. The Commission's order on reopening would violate the Fifth Amendment to the Constitution.

## ARGUMENT.

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### I.

**Appellee Acquired the Certificates and Operating Rights in Appropriate Proceedings Under the Applicable Sections of the Interstate Commerce Act. Now the Commission Proposes a Material Modification Thereof.**

The certificates and operating rights which the Commission by the enjoined orders seeks to modify were duly acquired in appropriate proceedings under the Interstate Commerce Act wherein the required statutory findings were set forth in the final orders of approval of April 1, 1938, and November 28, 1944. In consummating the authorized transactions appellee complied fully with said orders of approval.

Appellee acquired White Lines' rights pursuant to an application filed on October 7, 1937 (Docket No. MC-F-445; R. 237-479), under Section 213 of Part II of the Interstate Commerce Act (App., pp. 89 and 90), this section being that portion of the Act pertaining to the acquisition or merger of motor carriers. Section 213 required that in a proceeding to purchase or acquire the control of one carrier by another, the moving party should present an application to the Interstate Commerce Commission for approval of the transaction. If the Commission found (a) that the proposed transaction would be consistent with the public interest,<sup>2</sup> and (b) that the general conditions of Section 213 would be fulfilled, it was required to enter its order, approving and authorizing the purchase. Where, as here, the moving party was affiliated with a railroad, the applicant in such circumstances

was required to make the further showing: (c) that the proposed transaction would promote the public interest by enabling the affiliated railroad to use service by motor vehicle to public advantage in its operations, and (d) that the proposed transaction would not unduly restrain competition.

In its report and order of April 1, 1938, the Commission made the requisite findings and approved appellee's acquisition of the White Lines' certificate and operating rights. This is likewise true of the report and order of November 28, 1944, approving acquisition of the Frederickson certificate and operating rights. No question is raised in its reports and orders on reopening issued on March 4, 1946, and April 11, 1949, of any alleged failure by appellee to have satisfied the conditions of the orders issued April 1, 1938, and November 28, 1944, precedent to consummation of the transactions authorized by those orders. Necessarily, at the hearing before the examiners in support of its applications, appellee as the applicant not only made the usual showings such as would any other motor carrier, but in addition, as the Commission found in each proceeding, appellee discharged the further burden placed under Sections 213 and 5(2)(a)(b) of the Act (App., pp. 84, 89) upon a motor carrier affiliated with a railroad by showing that the authority sought to be acquired could and would be used to public advantage in the affiliated railroad's operations, and that the acquisitions would not unduly restrain competition.

The reports and orders of April 1, 1938, and November 28, 1944, were plenary in nature and represented final action of the Commission with regard to appellee's right to acquire the certificates and authorities purchased from White Lines and Fredericksons. Appellee was fully warranted, therefore, in acting thereunder to consummate

the transactions involved. Subject to the conditions of those orders which were met and fulfilled by appellee, it had the legal authority upon consummation of the transactions approved thereafter to conduct operations as a common carrier by motor vehicle upon the routes and in accordance with the operating rights authorized to be acquired.

By the orders of March 4, 1946, and April 11, 1949, however, through the medium of newly imposed conditions in appellee's certificate, the Commission, after reopening the proceedings upon its own motion and upon present records, would now drastically curtail appellee's operations as a common carrier by motor vehicle. In other words, eight years after approval of the White Line acquisition and more than a year after approval of the Frederickson transaction, the Commission is attempting to qualify its earlier final orders and the certificates acquired in pursuance thereof which authorized appellee to operate as such a carrier.

## II.

### **The Certificates and Operating Rights Acquired Included the Right to Engage in the Forms of Trucking Service Which the Commission Would Now Prohibit.**

The certificates and operating rights which appellee was authorized to purchase from White Lines and Fredericksons under the Commission's final orders of April 1, 1938, and November 28, 1944, included the right to engage in the forms of trucking service upon the acquired routes which the Commission by the reports and orders of March 4, 1946, and April 11, 1949, on reopening, would now prohibit. The prohibited forms would be, first (item (c), *infra*), a service at "all-motor" rates, as spelled out, so

the Commission said, in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943.\* The second prohibited form (under items (a), (b) and (c), *infra*) would preclude the rendition by appellee of uninterrupted service as a part of its motor common carrier operations between the Tri-Cities and Omaha. This is the key-point limitation. Both restrictions would be imposed under proposed conditions No. 1 and No. 3 of the enjoined reports and orders: (R. 80, 81; 126.) The result of the proposed restrictions would be seriously to cripple appellee's operations as a motor common carrier by excluding it from a substantial volume of traffic which it would otherwise enjoy. Appellee's investment as a direct consequence would be substantially impaired.

The forms of trucking service in which appellee has engaged upon these routes are and have been: (a) a coordinated rail-service, at rail rates auxiliary to the existing service of appellee's affiliated railroad; (b) a motor service in substitution of rail service, at rail rates; and (c) a motor common carrier service at rates and tariffs observed and applied by appellee's predecessors, as modified from time to time. This means that appellee has been carrying traffic moving at railroad rates and billing where the railroad has employed appellee to perform service auxiliary to the railroad's service. In addition, as supplementary to the rail service, appellee has conducted a motor carrier service transporting freight originated by it or other motor carriers under motor carrier billing and on rates published and filed under Part II of the Act. (Sees. 216 and 217, 49 Stat. L. 560; Sees. 316 and 317, Title 49, U. S. C. A., App. pp. 90 and 91.) These forms of operation mean, furthermore, that appellee has

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\* From page 726: "it (the carrier) \* \* \* may not properly be a party to tariffs containing all-motor or joint rates \* \* \*."

been transporting both kinds of traffic without impediment between the Tri-Cities area of Davenport and Bettendorf, Iowa, and Rock Island and Moline, Illinois, and Omaha, Nebraska. Under the key-point restriction proposed, however, appellee would be denied the right to do so in connection with future operations.

At the time of the hearing in the *White Line* case before the examiner to whom the application was initially assigned, appellee made it clear that it did not propose to limit its operations to those which could be used solely as an adjunct of its railroad affiliate and only to that rail carrier's rates. We quote briefly from the record of proceedings:

"Q. (By Examiner Higgins.) You also propose to perform a straight truck service station to station without relation to any rail movement, on short hauls?

A. That is correct."

"Q. (By Examiner Higgins.) Are you proposing to institute a direct truck service between Chicago and Omaha, with the exception of serving points between East Moline or the Tri-Cities and Chicago?

Mr. Boe: That is right.

Examiner Higgins: You propose to institute a direct truck service which will move tonnage from Chicago to Omaha and points intermediate, west, we will say, of Moline, without relationship to any rail movement, and moving at rail rates?

A. No (a misreport for 'yes'), sir.

Q. (By Examiner Higgins.) Moving at truck rates?

A. Yes, sir."

"(Mr. Boe.) This is the type of service we propose to offer. We want to utilize highway carrier service to its maximum economic value, especially having in mind the public interest in so far as railroad ownership and control is concerned, and if that can be ac-

complied by offering in addition to other types of service an all-highway service, we would like to be privileged to extend that service." (R. 411, 412.)\*

The examiner nevertheless recommended a rail rate limitation, that no truck service shall be conducted at other than rail rates. This is the very limitation the Commission would now impose under the conditions proposed to be added to appellee's certificate and operating authority by the reports and orders of March 4, 1946, and April 11, 1949, in the reopened proceedings.

However, after considering appellee's exceptions to the rail rate limitation proposed by the examiner the Commission *eliminated* that limitation from its order of approval of April 1, 1938. Rather, it *determined not to* include that limitation in its order. In that order the Commission stated that its conclusions differed somewhat from those recommended by the examiner. (R. 27.) In discussing the type of operation which it would approve for appellee as a motor carrier affiliated with a railroad, the Commission referred to its decisions in the *Barker* case (*Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101, and 5 M. C. C. 9 and 49), observing:

We conditioned our authorization in the *Barker* case to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad, and in general indicated the scope of approved and disapproved operations. Many of the operating rights which would accrue to applicant under the instant transaction, if no conditions were imposed, are of a character which we disapproved in the case cited. Applicant concedes this fact and, as heretofore stated, is agreeable to aban-

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\* This was further made clear by appellee's witnesses. Peterson, R. 290, 291, 316, 317; Van Maren, R. 361; Crouse, R. 367; Cummins, R. 373, 374, 376; Snow, R. 379, 380; and Davidson, R. 400, 402, 403, 413, 414.

donment of all rights *except common-carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids*, and the "grandfather" applications of White Lines will be considered as amended accordingly? (R. 32. Emphasis supplied.)

When it is remembered that White Lines claimed "grandfather" operating rights east of Chicago, Illinois which was beyond the rail territory of the Rock Island railroad, the foregoing observation becomes readily understandable. The limitation which was in the Commission's mind manifestly was geographical in character. Nowhere in the Barker decisions did the Commission refer to a restriction as to rail rates. If the Commission by its action reflected in the report of April 1, 1938, intended that appellee's service should be limited to the rail rates of its affiliated rail carrier, why did it modify the examiner's recommended order *by eliminating* from its own order the very restriction which the examiner had proposed and to which appellee had specifically excepted in its Brief of Exceptions? Why did the Commission say in its report of April 1, 1938,\* that there was no occasion to attach conditions affecting rates to a grant of authority in this case under Section 213? Finally, as a condition to consummation of the transaction, why was appellee required unconditionally to adopt the rates and tariffs of White Lines? (R. 35; 479, 480.) Such rates and tariffs of White Lines were "all-motor" in nature, and palpably had no reference to the rail rates and tariffs of appellee's affiliated railroad.

Appellee's acquisition of the Frederickson certificate

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\* "The act contains specific provisions governing our powers with reference to the regulation of motor carrier rates, including joint rates with other types of carriers. We are of the opinion, therefore, that there is no occasion to attach conditions affecting rates to a grant of authority herein under section 213." (R. 33.)

and operating authority followed substantially the same course as the White Line transaction. The proceeding was the subject of a full hearing before an examiner on November 17, 1943, at which appellee made plain that in addition to coordinated service, it also proposed to engage in all-motor service such as had been rendered by the Fredericksons. Appellee's General Manager, William F. Peterson, testified before the examiner as follows:

"Witness Peterson: A. The applicant will not only continue in effect the service now rendered by the Fredericksons, but will improve upon it. \* \* \* And, of course, we will also bring to this territory for the first time a coordinated service with the Rock Island Railroad, an entirely new service not heretofore available." (R. 515.)

"Examiner Clifford: Q. Is it proposed as a result of this transaction, to provide an all-motor service over this route unrelated to the rail service?

A. It is, yes." (R. 517) \*

As in the White Line transaction, the Commission by its report and order of November 28, 1944 (R. 573), made the statutory findings that the transaction was consistent with the public interest, that it would enable appellee's affiliated rail carrier to use motor vehicle service to public advantage in its operations, and would not unduly restrain competition; and, further, that if the transaction was consummated, appellee would be entitled to a

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\* To the same effect was the testimony of witnesses O. W. Limestone, Division Superintendent of the Rock Island railroad (R. 541); Walter M. Wharton, Manager, Transportation Department, Omaha Chamber of Commerce (R. 525); Leo Farner, Owner, Farner Department Stores, Harlan, Iowa (R. 543, 544); Bruce Potter, Manager, Green Bay Lumber Company (R. 548); R. T. Gould, Traffic Manager, Harlan Produce Company (R. 553); H. Seifert, Owner, Seifert Lumber Company (R. 555); J. P. Montgomery, Owner of a drug store at Shelby, Iowa (R. 556); John C. Milne, Traffic Manager and Plant Superintendent, Skinner Manufacturing Company (R. 560); and R. B. Wixon, Traffic Manager, Carpenter Paper Company. (R. 563.)

certificate covering the operating rights granted Fredericksons in Nos. MC-530 and MC-530-Sub. 1, i. e., the rights involved in this acquisition proceeding. This order also provided that unless the authority granted was exercised within 180 days from its date it would be of no further force or effect. (R. 581.) Appellee thereupon proceeded to consummate the Frederickson transaction as required by said order, notifying the Commission within the specified time of its intention to consummate, and taking the directed step of complying with Section 217 of the Act and the Commissions' rule compelling the adoption by appellee of Fredericksons' rates and tariffs. (R. 479, 480; 586, 587.) These were all-motor rates and tariffs of a common carrier by motor vehicle—not the rail rates of appellee's affiliated railroad.

By the enjoined orders of March 4, 1946, and April 11, 1949, the Commission would also impose a key-point restriction.\* The common carrier operating rights which appellee had acquired from White Lines were recognized by the Commission in the Frederickson report of November 28, 1944, in the following expressive language:

"Certain of Transit's present freight operations are subject to the limitation that service shall be solely that which is auxiliary to and supplemental of the train service of the railroad, and either that freight so handled shall have an immediately prior or subsequent rail haul by the railroad, or that it shall not be transported from, to or between more than one of specified key points. *However, its route between Atlantic and Omaha, Nebr., over U. S. Highway 6, serving all points which are stations on the railroad, is part of a route to and from Chicago, Ill., via Des Moines, acquired pursuant to authority granted in Rock*

\* 3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Neb., Des Moines, Iowa, and collectively Davenport and Bettendorf and Rock Island, Moline, and East Moline, Ill. (R. 81, 126.)

*Island M. Transit Co.—Purchase—White Line M. Frt., 5 M. C. C. 451, and is not so restricted.” (R. 48; emphasis supplied.)*

From the inception of its operations appellee could carry a shipment of freight by motor truck from Moline to Des Moines, or from Omaha to Des Moines, and in various other combinations, *i. e.*, to or from, or through, or between any points on its routes. This would not be permissible under proposed condition No. 3. That condition would cut appellee's operation into segments by the use of key-points at the Tri-Cities, Des Moines, and Omaha. Should it become effective, a shipment may thereafter only go westbound from the Tri-Cities to some point east of Des Moines, but not to Des Moines, or from Des Moines to some point east of Omaha, but not to Omaha. Similarly eastbound it will only be able to move freight from Omaha to some points short of Des Moines, but not to Des Moines, or from Des Moines short of the Tri-Cities, but not to the Tri-Cities. Numerous other examples could be cited. It will thus be seen that the key-point limitation would vitally change appellee's operating authority. This Court recognized the basic nature of such a change and its devastating effect in *U. S. v. Carolina Freight Carrier Corp.*, 315 U. S. 475. There, as in these proceedings, the applicant had bought “grandfather” rights from a predecessor in bona fide common carrier operation before the critical date of the Act. The operations were shown to be common carrier in nature, but over irregular routes in a designated territory. In granting the certificate the Commission sought to limit carriage of certain commodities to certain specified points. The court struck down the restriction saying:

“If the applicant had established that it was a ‘common carrier’ for a group of commodities or for an entire class or classes of property and was in ‘bona fide operation’ during the critical periods in a

specified territory, restrictions on commodities which could be moved in any one direction *or between designated points* would not be justified. \* \* \* Presumptively one who had established his status of 'common carrier' would be entitled to carry all of the commodities embraced in his undertaking *to all points to which any shipments of any articles were authorized.*" \* \* \*

"But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure."

\* \* \* "To appellee *such matters involve life or death.* Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. \* \* \* (Such) A restriction \* \* \* is a patent denial to appellee of that 'substantial parity between future operations and prior bona fide operations' which the Act contemplates." (315 U. S. 475, at 486, 488.) (Emphasis supplied.)

Key-point restrictions were not in existence at the time of the issuance of the reports in the *Barker* cases, 1 M. C. C. 101, and 5 M. C. C. 9, decided on October 8, 1936, and March 6, 1937, nor were they in existence in April, 1938, when the Commission approved appellee's acquisition of the White Line operating rights. This type of restriction first appeared in *Kansas City Southern Transport Co., Inc., On Reconsideration*, 28 M. C. C. 5, decided January 24, 1941—almost three years after the White Line decision.

In both the White Lines proceeding and the *Frederickson* proceeding appellee in the manner and form prescribed by law had duly acquired the certificates and operating rights of these vendors. In reliance upon the final orders of approval of April 1, 1938, in No. MC-F-445, and November 28, 1944, in No. MC-F-2327, appellee parted with the sums representing the purchase prices of these acqui-

tions. Upon the authorizations of these orders it proceeded to conduct operations over these routes as a common carrier by motor vehicle and committed itself to expenditures in the improvement of equipment and facilities needful to the rendition of an adequate service.\* Yet the Commission by its reports and orders of March 4, 1946, and April 11, 1949, on reopening, and wholly apart from the limitations of Section 212 of the Act upon its powers to change or modify a carrier's certificate of public convenience and necessity, would treat the orders of April 1, 1938, and November 28, 1944, as conditional to the point of permitting what amounts to a revocation of a substantial portion of the operating rights acquired. This change is proposed notwithstanding that in the proceedings before the Commission leading to the orders of approval of April 1, 1938, and November 28, 1944, appellee clearly showed that it intended to engage in operations as a common carrier by motor vehicle in the several methods described. While the reports of the Commission on reopening go to great length to justify its action represented by the orders of March 4, 1946, and April 11, 1949, the Commission in those reports has nowhere claimed that appellee in proceedings precedent to approval of the acquisitions failed to make a full disclosure of its purposes in acquiring these operating authorities or remotely hint that appellee had indulged in any misrepresentation or deception in the presentation of its case.

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\* Appellee's certificate of December 3, 1941, among other things, reads:

It is further ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and the failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate. (R. 40, 45.)

## III.

**The Commission's Holding in the Reopened Proceedings That at the Time of Approval of the White Line and Frederickson Transactions, the Term, "Auxiliary to and Supplemental of Train Service," Did Not Permit the Rendition by Appellee of All-Motor Service, is Contrary to Its Own Previous Construction of That Term.**

The Commission's reports of March 4, 1946, and April 11, 1949, on reopening, were erroneous in holding that appellee is and was without authority to perform service under all-motor local and all-motor joint rates with connecting carriers, and that it has no authority to enter into joint rates with other motor carriers. The record demonstrates that prior to and at the time of the approval of the White Line transaction and the issuance to it of a certificate, and at the time of the approval of the acquisition of the Frederickson certificate, the term, "auxiliary to and supplemental of train service," did not prohibit the rendition by appellee of all-motor service directly for the shipping public at all-motor rates in addition to the service at rail rates in substitution of the rail service of its affiliated railroad.

The term, "auxiliary to, or supplemental of, train service," is not statutory language, and is terminology of the Commission's own creation. The statutory findings in proceedings required by Sections 213 and 5(2)(a)(b) under which the White Line and Frederickson applications were filed do not use this language. Those statutory findings were appropriately made in the White Line and Frederickson proceedings, and such findings were adequate as a statutory basis for the Commission's approval of the transfer of the involved operating rights to appellee.

The term "auxiliary to or supplemental of train service"

was first used in the Commission's decision in *Pennsylvania, etc., Control, Barker Motor Freight, Inc.*, 1 M. C. C. 101, decided October 8, 1936. A fair interpretation of that decision, so appellee maintains, compels the conclusion that the quoted phrase meant no more than that the service authorized should be restricted to territory already served by the Pennsylvania Railroad. The Commission considered the case further in a decision issued on March 6, 1937 (5 M. C. C. 9), and in clarifying its earlier order, said:

"Hence our order will provide, in connection with the routes here authorized, that service by applicants' motor vehicles may not be accorded to, or traffic interchanged at, any point which is not also a station on the Pennsylvania, \* \* \*."

Many pages have been devoted in both reports of March 4, 1946, and April 11, 1949, on reopening, to a discussion of the *Barker* case and the phrase "auxiliary to, or supplemental of train service".

By its reports on reopening the Commission would read the "*Barker*" rule into this case. In its report of April 11, 1949, the Commission said:

"There is likewise no logical basis for any assumption on its (appellee's) part that the intent of the *Barker* reports, which by expressed reference was also made the intent of the report in No. MC-F-445 (White Line), was that the phrase 'auxiliary to, or supplemental of, rail service' should mean that the rail carrier affiliate there, and Trans here, were to be allowed to engage in motor carrier operations wholly independent of rail service so long as performed only to and from points at which the railroad had stations or, as now put, so long as confined geographically to rail-service territory."

Since the Commission relies so heavily in its reports of March 4, 1946, and April 11, 1949, upon its expressions in the *Barker* case, to support its assertion that the term

"auxiliary to, or supplemental of, train service" did not mean "all-motor" service as further "spelled out" in the *Texas & Pacific* case, 41 M. C. C. 721, it is proper to refer the Court to the Commission's own interpretation of the "Barker" rule stated recently in a related proceeding. That proceeding is *Pennsylvania Truck Lines, Inc., Extension—Lebanon, Ohio* (Docket M. C. 19201-Sub. No. 34; report of January 6, 1948; 47 M. C. C. 837, not printed in full in printed report). Pennsylvania Truck Lines, Inc., is a motor affiliate of Pennsylvania Railroad Company, and was the applicant in the *Barker* case, *supra*. In its official report of January 6, 1948, in Docket M. C. 19201-Sub. No. 34, in describing the Barker rights acquired by Pennsylvania Truck Lines, Inc., the Commission, through Division 5, used this striking language:

"Under the Barker certificate applicant performs two distinct types of service; (1) substituted service for the railroad, and (2) *independent motor carrier service for the general public. The latter service involves the transportation of general commodities, in any quantity, under motor carrier bills of lading and tariffs and at motor carrier rates.* \* \* \* Substituted service was being performed by applicant at the time of the hearing in January, 1945, over several routes most of which radiate out of Pittsburgh and Columbus. Independent service also was being performed at that time only over regular routes extending principally between the following points: \* \* \* *Applicant has its own agents and representatives who deal with the shippers in the performance of the independent service.* In January 1945, 200 units of equipment were being used in independent service and 500 in substituted service." (Emphasis supplied.)

The Commission also refers at length to *Kansas City Southern Transport Company, Inc., Common Carrier Application*, 10 M. C. C. 221 (November 12, 1938); on rehearing 28 M. C. C. 5 (January 24, 1941). (R. 109, 110.) A

fair reading of the text of the reports in the *Barker* cases, 1 M. C. C. 101, and 5 M. C. C. 9, will not disclose any information that the term embraced a restriction as to rail rates and rail billing.

Key-point restrictions had not been invented by the Commission at the time of the *Barker* decisions (October 8, 1936, and March 6, 1937). The key-point restriction did not come into existence until the decision in *Kansas City Southern Transport Co., Inc.*, on reconsideration. (28 M. C. C. 5; January 24, 1941.) This was a consolidated proceeding and included an application of appellee's rail affiliate for motor rights. The case was decided almost three years *after* the Commission had approved the *White Line* purchase by appellee.

Commissioner Lee, who here joined in the reports and orders on reopening, dissented in the reopened *Kansas City Southern Transport* case because he did not regard the term "auxiliary to, or supplemental of" as a restriction on motor carrier operations. We quote from his dissent:

"The result is that they are granted authority to engage in motor-carrier operations and to furnish motor-carrier service which are not coordinated with or in anywise tied into rail operations or rail service but which, on the contrary, will duplicate the operations and the service provided by existing motor carriers and found to be adequate to fill the public need. *In making this statement I have not overlooked the fact that the instant report retains condition 1 without change in text.*\* It is clear, however, from the views expressed therein that the meaning intended to be accorded to that condition nullifies its restrictive effect to such an extent that the result stated above correctly describes the authority granted." (28 M. C. C. 5, 24.) (Emphasis supplied.)

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\* Condition 1 was that which required the applicant's service to be "auxiliary to, or supplemental of," of the rail service of its controlling railroad.

In *Rock Island Motor Transit Company Extension—Eldon, Iowa*, 33 M. C. C. 349, the Commission had before it that part of the White Line route between Chicago and Silvis. The Commission through Division 5 found that The Rock Island Motor Transit Company was entitled to a certificate permitting operations between Chicago and Silvis subject to certain conditions, among others, that the proposed service should be auxiliary to or supplemental of the rail service of the Rock Island Railroad, that no points except a rail station should be served, and subject to certain key-points. As to the Chicago-Silvis route (which was a "late grandfather" route of White Line), Commissioner Rogers, who also here joined in the reports and orders on reopening, dissenting, said:

"It is my opinion that public convenience and necessity has not been shown to justify the railroad subsidiary to conduct an all-out motor-carrier service between Chicago and Silvis which, *when connected with its Silvis-Omaha route*, permits such a service from Chicago to Omaha. I would impose restrictions designed to limit the operation to a service *truly* auxiliary to or supplemental of the railroad service." (33 M. C. C. 349, 361.) (Emphasis supplied.)

In other words, Commissioners Lee and Rogers, who joined in the majority reports of March 4, 1946, and April 11, 1949, and presumably now agree with the interpretation later "spelled out" in the *Texas & Pacific* case, 41 M. C. C. 721, maintained, *at the time they wrote their dis-*

\* This term has reference to paragraph (b) of Section 206 of the Motor Act to the effect that "any person not included within the provisions of paragraph (a) of this section, who \* \* \* was engaged in transportation in interstate \* \* \* commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of 120 days thereafter without a certificate, and if application for such certificate is made to the Commission within such period the carrier may \* \* \* continue such operation until otherwise ordered." The segment of the White Line routes from Silvis to Chicago, which is shown in yellow hatched line on Exhibit 1 of the complaint is the route referred to in *Rock Island Motor, etc.*, 33 M. C. C. 349.

sents as quoted above that the term "auxiliary to, or supplemental of, rail service" *did not* preclude all-motor service not coordinated with or in anywise tied into rail operations, or that the appellee was foreclosed from conducting an "all out" motor-carrier service.

The foregoing references to Commission expressions should be sufficient amply to demonstrate the meaning and effect given this critical term by all concerned up to March 4, 1946. They find further agreement in *Pacific M. Trucking Co.—Purchase—Valley M. Lines, Inc.*, 39 M. C. C. 441, 447, where it was said:

"Evidence showing how such service could and would be rendered in various ways, if the transaction were approved, has been accepted and found sufficient to support the required statutory finding. Usually, such evidence has related to motor-carrier operations in combination and in coordination with the railroad's operations, resulting in expedited service, and savings for the railroad, but no condition has heretofore been imposed in acquisition cases limiting the transportation authorized *solely* to transportation in combination with the railroad of the railroad's freight, or *preventing* the motor-carrier operations and service being made directly available to the shipping public apart from and in addition to the railroad's service. The only definite restriction on the operating authority which was imposed in the *Barker* case and later cases has been designed to confine the motor-carrier operations acquired to the territory of the railroad through limiting the rights so as to authorize service only at stations on the railroad. Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that service to be rendered should be 'auxiliary and supplementary' to the railroad's service, there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier service directly for the shipping public under the operating rights in addition to, in substitution for, and in lieu of, the parent railroad's service, or to restrict the operation solely to one in combi-

nation with the railroad's operation; nor is it our understanding that it has been so construed by the carriers. In other words, evidence upon which affirmative action has often been based, and the finding made that the resulting service would be auxiliary and supplementary to that of the railroad, has been based upon a motor-carrier operation in *addition to*, in *substitution for* and in *lieu of*, the railroad's operation, as well as upon an operation in *combination with* the railroad. *Southwestern Transp. Co.—Purchase—Hill and Howe*, 37 M. C. C. 83, in which petition for reconsideration was denied by the Commission March 2, 1942." (Emphasis supplied.)

The term "auxiliary to and supplemental of" was intended to be territorial in its application and clearly did not refer to rates. Otherwise, there would be no ability in a motor carrier so restricted to serve any point not served by the railroad to whose rates and billing it was limited. Obviously a railroad may not publish rates to a point which it does not serve. Yet, appellee was granted authority to serve a number of points within the trade territory of its railroad affiliate that are not actually located on said railroad.\*

Not only does the Commission now read into the term "auxiliary to, or supplemental of rail service," a restriction as to rates, but it says, "the phrase in question \* \* \* cannot be considered as synonymous to the conduct of motor carrier operations totally independent of rail service, competitive with the railroad and with other motor car-

\* Examples may be cited: Ames, Iowa (Docket MC-F-468, *The Rock Island Motor Transit Co.—Purchase—Burlington Transp.*, 5 M. C. C. 629, decided June 20, 1938); Leavenworth, Kansas (Docket MC-F-561, *The Rock Island Motor Transit Co.—Purchase—Swaim*, 25 M. C. C. 350, decided July 12, 1939); Camp Robinson, Perryville, and Plainview, Arkansas (Docket MC-F-1932, *The Rock Island Motor Transit Co.—Purchase—Corpier*, 39 M. C. C. 561, decided February 8, 1944); and Leonardville, Kansas (Docket MC-F-2746, *The Rock Island Motor Transit Company—Purchase—Adams*, 40 M. C. C. 411, decided December 29, 1945).

riers in their own field \* \* \*." (R. 107.) It did not so construe the "Barker" rule as recently as January 6, 1948, in *Pennsylvania Truck Lines, Inc., Extension—Lebanon, Ohio*, Docket M. C. 19201—Sub No. 34, *supra*, when it used the following language:

"Under the Barker certificate applicant performs two distinct types of service; (1) substituted service for the railroad, and (2) *independent motor carrier service for the general public. The latter service involves the transportation of general commodities, in any quantity, under motor carrier bills of lading and tariffs and at motor carrier rates \* \* \*.*" (Emphasis supplied.)

All that Sections 213 and (5)(2)(b) required where the applicant was affiliated with a railroad was that the Commission find that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition. Such findings were appropriately made in the original orders of approval of April 1, 1938, in the White Line transaction, and November 28, 1944, in the Frederickson transaction.

The Commission asserts (R. 66) that from the date of its decision in the *Barker* case, the principles there recognized and applied, and as now attempted to be applied to appellee, controlled the disposition of practically every rail-motor acquisition case, and that during that period approximately forty of such cases were decided. Appellee has shown that as recently as January, 1948, in *Pennsylvania Truck Lines, etc.*, Docket MC-19201-Sub. 34 (*supra*, p. 40), the Commission itself recognized that the Barker "principles" (now by it claimed to have prohibited all-motor service) *did not* preclude "independent motor service" at all-motor rates. Until the receipt of the Commission's communication of March 3, 1945 (R. 493), following

the decision in *Texas & Pacific M. Transport, etc.*, 41 M. C. C. 721, on reopening, appellee in all prior acquisitions had been consistently required under the Commission's Tariff Circular M No. 1 (R. 480) and the orders of approval to adopt the all-motor rates of its motor carrier predecessors in interest. It is proper to observe that as applied to appellee's acquisitions the consistency has been on the side of not only permitting but *requiring* an all-motor service to be performed.

#### IV.

**The Proposed Rate Restriction Would Be Repugnant to Sections 216 and 217 of Part II of the Act. Further, Said Restriction Would Deny to Appellee the Right to Exercise the Privileges of a Common Carrier by Motor Vehicle.**

The proposed rate restriction would be repugnant to the mandatory as well as the permissive provisions of Sections 216 and 217 of Part II of the Act. (App. pp. 90, 91.) The Commission's action on reopening of the proceedings reveals a misconception of its powers when it attempts to impose this restriction in connection with appellee's acquired certificates and the exercise of the privileges of a common carrier by motor vehicle granted by said certificates. In its report of April 1, 1938, approving the White Line acquisition, the Commission said:

"The Act contains specific provisions governing our powers with reference to the regulation of motor carrier rates; including joint rates with other types of carriers. We are of the opinion, therefore, that *there is no occasion to attach conditions affecting rates to a grant of authority herein under Section 213.*" (R. 33. Emphasis supplied.)

Now, however, the Commission would depart from this correct construction of the law.

Under Section 216(b) it is made the duty of every common carrier of property by motor vehicle to establish, observe, and enforce just and reasonable rates, charges, and classifications. Under Section 216(c) such carriers "may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad." The test of the measure, kind and quality of the rate is fixed by Section 216(d) reading in part as follows:

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 217, with which appellee was specifically required to comply by the orders of April 1, 1938, in MC-F-445, and of November 28, 1944, in MC-F-2327, requires common carriers by motor vehicle to file with the Commission and keep open to public inspection tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith. This section further provides that, "the tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information as the Commission by regulations shall prescribe." The record clearly shows

that appellee complied fully with the requirements of Section 217, and the Commission's tariff circular requiring adoption of the vendor motor carriers' tariffs. There is no suggestion whatever in the reports on reopening that appellee has violated the provisions of Sections 216 and 217.

In the event the reports and orders in the reopened proceedings should become effective, appellee, contrary to the provisions of Sections 216 and 217, would be denied the right to publish all-motor rates and to enter into joint rates or interchange traffic with other motor carriers. The proposed change or modification of appellee's certificate would restrict its operation solely to the handling of freight of its railroad affiliate under the rail rates and bills of lading of its affiliate. It would eliminate appellee entirely from the field of common carriage by motor vehicle. It may not hold itself out to the public as a common carrier; it may not accept goods for transportation, except those which it receives from its railroad affiliate; it may not issue its own bills of lading; and it may not file its own tariffs. In short, it will cease to exist as a common carrier.

In considering these vital changes in appellee's certificate, as now being attempted, it is well to note the specific characterization of a common carrier by motor vehicle as that term is defined in Part II of the Interstate Commerce Act. Among the definitions found in Section 203 of that Act is that of a common carrier by motor vehicle, as follows:

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate \* \* \* commerce of property or any class or classes thereof for compensation, whether over regular or irregular routes \* \* \*." (App., p. 85.)

The rights acquired by appellee from the White Line companies and Frederickson were those of a common carrier by motor vehicle, and they were so regarded by the Commission until it reopened these proceedings eight years after appellee took over the operating rights of White Lines.

The Supreme Court recognized and gave full weight to the statutory definition of common carrier in *U. S. v. Carolina F. C. Corporation*, 315 U. S. 475, where at page 483, the Court said:

"As we have noted, a 'common carrier by motor vehicle' was defined in Section 203(a)(14) as one who 'undertakes' to transport 'passengers or property, or any class or classes of property for the general public'."

The rate and key-point limitations would be contrary to the established law on the subject expounded in such cases as *U. S. v. Louisiana & P. R. Co.*, 234 U. S. 1; *Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, 89 F. (2d) 865, cert. den. 302 U. S. 706; *The Oakley C. Curtis*, 4 F. (2d) 979, cert. den. 267 U. S. 599. They would even be contrary to numerous Commission decisions in other cases, for example:

"A limitation in a certificate which restricts the operation to service for farmers is inconsistent with the duties of a common carrier." (*Howitt Common Carrier Application*, 23 M. C. C. 271.)

"Such limitation in a certificate, however would be inconsistent with applicant's duties as a common carrier and will not be imposed." (*Lindeman Common Carrier Application*, 29 M. C. C. 183 at p. 184.)

"We cannot, with applicant's common carrier status, restrict its service to particular shippers, namely, forwarding or earloading companies." (*Barnett Trucking Company—Common Carrier Application*, 41 M. C. C. 303, at 306.)

"To restrict traffic which it may transport to shipments made by freight forwarders would, in effect and result, be a restriction of applicant's service to such forwarders." (*Globe Cartage Company, Inc.—Common Carrier Application*, 41 M. C. C. 313, 322.)

"Although applicant considers the above-described operations to be those of a contract carrier, it asks that it be granted a certificate as a common carrier, if we should find its operations to be those of a common carrier. As has been stated, applicant's operations are not limited to the transportation of passengers for the railway only, but between the same points and over the same route it transports passengers in common-carrier service. With respect to such operations, it publishes or participates in tariffs and issues its own tickets." (Contract carrier permit was denied because an existing common carrier certificate appropriately conferred the necessary authority.) (*Vermont Transit Co., Inc.—Contract Carrier Application*, 23 M. C. C. 470-471-2.)

The foregoing references to this Court's and the Commission's expressions highlight the striking impropriety of the Commission's attempt, on reopening the proceedings, to impose upon appellee's certificate conditions which are inconsistent with its common carrier status, and which cut down the nature of its service and operations established by appellee's predecessors in interest. With respect to a successor carrier's rights the Court in *U. S. v. Carolina Freight Carrier Corp.*, 315 U. S. 475, pointed out that "the Commission is without statutory authority in the first instance to grant less than '\* \* \* that 'substantial parity between future operations and prior bona fide operations' which the Act contemplates." In *Alton R. Co., et al. v. U. S.*, 315 U. S. 15, the Supreme Court used the same language in indicating the nature of operating rights which must under the statute be conferred by such a certificate. It spoke of '\* \* \* creating that substantial parity between future operations and prior bona fide operations

which the statute contemplates." If the Commission had no lawful power to diminish the "grandfather operating rights" to which the White Line and Frederickson companies were initially entitled, certainly it has no power to diminish those rights at some later date upon acquisition by appellee except as such power may be otherwise provided by statute. That power is delimited with precision in Section 212(a) of the Act, and only in Section 212(a). (App., p. 88.) Here, however, the Commission admits that it is not proceeding under that Section.

## V.

### **Unless the Commission Acts Within the Provisions of Section 212 of Part II of the Interstate Commerce Act, It Is Without Authority to Modify or Revoke a Certificate.**

Part II of the Act provides only one method for modifying or revoking certificates, namely, Section 212. That section contains the only provisions pursuant to which modification or revocation of a certificate may be accomplished. The Commission admits\* that in imposing the new restrictions it is not acting in accordance with the provisions of Section 212. In argument before the Three-Judge District Court counsel disclaimed that the reopened proceedings were being conducted within the purview of that section.\*\*

\* The Commission's report of April 11, 1949. (R. 111-118.)

\*\* Judge Shaw: You claim by that reservation you have the right to impair and diminish the authority that was previously given?

Mr. McFarlane: That is right, your Honor, that is why we include in that certificate the reservation of power to restrain within the bounds of the authority granted.

Judge Shaw: What gives you the right to restrict?

Mr. McFarlane: None without reason for the restriction, your Honor, you have to suppose they are operating beyond the bounds of their authority.

Judge Shaw: Section 212 provides for that, doesn't it?

Mr. McFarlane: I will admit right now we had no right to

The Commission contends that Section 212 does not apply because it had reserved the power in the certificate which was issued to appellee to impose restrictions calculated to insure that appellee's operations "from this point on" shall be limited to operations definitely auxiliary to or supplemental of rail service. (R. 111.) In passing, it is noteworthy that the modifier "definitely" appeared in the reports of March 4, 1946, and April 11, 1949, on reopening, but it was not used in the original reports of April 1, 1938, and November 28, 1944.

Section 212 provides that certificates shall be effective from the date specified therein, and shall remain in effect until suspended, or terminated as therein provided. This section further defines the specific grounds upon which the Commission may amend or revoke a certificate, *i. e.*, "for willful failure to comply with any provision of this part, or with any lawful order, rule, ~~or~~ regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license." Appellee has not been charged with violating any of the provisions of Section 212, and the Commission is not proceeding as if it had so charged appellee. The Commission claims that it is merely exercising a specifically reserved authority.

The decision of the Supreme Court in *United States, et al., v. Seatrain Lines*, 329 U. S. 424, 91 L. Ed. 396, 67 S. C. Rep. 435 (January 6, 1947), effectually construed the limitations upon the Commission's power, upon a

tamper with that certificate on the basis of Section 212. It is under the terms of the certificate itself. (R. 186.) \* \* \*

Mr. Crenshaw: Just these, it is not a question of Section 212. I admit if that were it, we would not have a case in court; I admit it is not a case of statutory authority particularly in this specific case, and I contend that this is a case in which we are simply struggling to bring the operation of this plaintiff within the scope of what we granted him in that first White Line grant of authority. (R. 192.)

reopening on its own motion, to modify, forfeit or revoke a certificate lawfully issued and acquired.

A certificate had been issued to Seatrain Lines to carry general commodities by water. Under this certificate it was conducting a rather specialized service of carrying loaded rail box cars from port to port. It was also carrying packaged freight like any other port to port line. There was also some transportation of liquid bulk carloads. The certificate contained a condition that it would be subject "to such terms, conditions and limitations as are now or may hereafter be attached to the exercise of such authority by the Commission." A year and a half later the Commission, on its own motion, ordered a reopening for the purpose of determining whether or not the certificate should be "modified" so as to eliminate the right of carrying commodities generally—in other words, to restrict it to the hauling of the rail freight in rail box cars and the incidental bulk liquids. In discussing the Commission's power to revoke or modify substantially an original certificate issued under the Interstate Commerce Act, the Court in the *Seatrain* case said:

"The water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers. The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers. Section 212(a), Part II, Interstate Commerce Act, 49 Stat. 555, 49 U. S. C. § 312(a). In fact, when the water carrier provisions were pending in Congress, the Commission's spokesman, Commissioner Eastman, seems specifically to have requested the Congress to include no power to revoke a certificate. The Commissioner explained that while the power to revoke motor carriers' certificates was essential as an effective means

of enforcement of the motor carrier section, it was not necessary to use such sanctions in the regulation of water carriers. It is contended nonetheless that the Commission has greater power to revoke water carrier certificates, where Congress granted no specific authority at all, than to cancel and revoke motor carrier certificates where specific but limited authority was granted. *But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in § 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. (Citing Smith Bros. Revocation of Order, 33 M. C. C. 465.) (Emphasis supplied.)*

In the *Seatrain* case, *supra*, the Court had before it an attempt by the Commission to modify a certificate granted to a water carrier under Part III of the Interstate Commerce Act (Act of September 18, 1940, 54 Stat. L. 1929; Title 49, Section 901, *et seq.*). In its opinion the Court there observed that the water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission the power to regulate railroads and motor carriers as well as water carriers and further that the Commission is authorized to issue certificates to all three types of carriers. Except for the provisions of Section 212 of Part II, which apply only to motor carriers and circumscribe the powers of the Commission of modifying or revoking certificates of motor carriers to the limitations of that section, essentially the same regulatory provisions apply to both water and motor carriers.\* While Section 213 (applicable to the White Line

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\* Section 206(a) of Part II has its counterpart in Section 309(a) of Part III; Section 206(b) of Part II, in Section 309(b) of Part III; Section 207 of Part II, in Section 309(c) of Part III; and Section 208(a) of Part II, in Section 309(d) of Part III.

transaction) became effective before Part III of the Act was enacted, it may be noted that Section 5(2)(a)(b) under which the Frederickson transaction was submitted and approved, applies to water carriers as well as motor carriers. The Court found in the *Seatrain* case that the Commission did not have the power to modify *Seatrain's* certificate. The certificates held and acquired by appellee are of the same essential nature as water carrier certificates. In the cited case the court found that the Commission had exceeded its authority, and recognized that the only power of modification which the Commission had as to motor carrier certificates must be found in Section 212 of Part II.

In the instant proceeding the Commission followed a course of conduct strikingly parallel with its action in the *Seatrain* case. The pattern is the same in the following material respects:

#### SEATRIN.

1. Certificate issued to *Seatrain* as "a common carrier by water of commodities generally," subject "to such terms, conditions, and limitations as are now or may hereafter be attached to the exercise of such authority by the Commission."

2. A year and a half after confirming authority, Commission, on its own motion, ordered that the proceedings be reopened for the purpose of determining whether the certificate should not be "modified" so as to eliminate the carrying of commodities generally.

3. *Seatrain* appeared and moved to vacate and rescind the order reopening on the ground that the Commission was without authority to make the al-

#### WHITE LINE.

1. Certificate issued to *White Line* as a common carrier by motor vehicle of general commodities subject to "further limitation, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary to or supplemental of the railroad and shall not unduly restrain competition."

2. Eight years later the Commission, on its own motion, ordered the proceedings reopened for the purpose of determining whether or not the operation should be restricted to insure that only service auxiliary to or supplemental of rail operations was conducted.

3. Appellee appeared and moved to vacate and rescind the

## SEATRAIN.

teration proposed. Seatrain motion denied.

4. Hearing set at which Seatrain declined to offer evidence, resting case on Commission's lack of authority to reconsider and alter the original certificate.

5. After argument, the Commission entered an order cancelling the original certificate and directing that a different one be issued depriving Seatrain of the right to carry goods generally and limiting it only to an operation of the empty and loaded railroad cars and liquid cargos.

6. Seatrain filed its bill for injunctive relief in a 3-Judge Court.

## WHITE LINE.

order reopening on the ground that the Commission was without authority to make the alteration proposed. Rock Island motion denied.

4. Hearing set at which Appellee declined to offer evidence, resting case on Commission's lack of authority to reconsider and alter the original certificate.

5. Commission entered order of April 11, 1949, cancelling original certificate and directing a different one be issued depriving appellee of the right to carry goods generally and limiting it only to the transportation of railroad freight and a key-point operation.

6. Appellee filed its bill for injunctive relief in a 3-Judge Court.

The analogy can be carried a step further: In the *Seatrain* case, *supra*, this Court observed:

"Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Foss Launch & Tug Co.*, 260 I. C. C. 103, decided December 18, 1943. There the Commission pointedly ruled for the first time that a certificate to carry 'commodities generally' did not authorize water carriage of loaded or unloaded freight cars—so-called 'car-ferry service.' Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case." (329 U. S. 424, at 429.)

In the instant case the Commission reopened the proceeding soon after it had reopened *Texas & Pacific M. Transport, etc.* (41 M. C. C. 721, at 726), where it "spelled out" the new definition of the term "auxiliary to or supplemental of rail service" as meaning that the Texas &

Pacific Motor Transport, an affiliate of the Texas & Pacific Railway, may not properly be a party to tariffs containing all-motor rates. It is proper to say here, as the Court said in the *Seatrains* case: thus it seems apparent that the Rock Island proceedings were reopened to execute a new policy.

In the *Seatrains* case the Court, referring to *Smith Bros. Revocation of Order*, 33 M. C. C. 465, noted that the Commission had itself recognized the limitations upon its power to change a certificate, the Commission using this positive language:

"\* \* \* once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208(a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212(a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act." (33 M. C. C. 465, at 472.)

Appellee maintains that the orders of April 1, 1938, in the *White Line* case, and November 28, 1944, in the *Fredrickson* case, were equivalent to the entry of final judgments or decrees and marked the end of the Commission's proceedings under Sections 213 and 5(2)(a)(b) of the Act pursuant to which appellee acquired the certificates of these motor carriers. The decisions of the Commission under those sections reflected finality of action. *U. S. and I. C. v. Seatrain Lines*, 329 U. S. 424; *Boulevard Transit Lines v. U. S. et al.*, 77 Fed. Supp. 594; *Smith Bros.*

*Revocation of Order*, 33 M. C. C. 465. That is not to say that the Commission may not revoke a motor carrier's certificate for the causes and in accordance with the procedures set out in Section 212. Proceedings under Section 212, being separate and apart from those conducted under Sections 213 and 5(2)(a)(b) would, of course, have to conform with the requirements of that section. First, the *cause* which gives ground for modification must be present, and second, the procedure must conform with the provisions of Section 212. Proceedings under Section 212 would be new and different from those under Section 213 and 5(2)(a)(b). Since Section 212 delimits the power of the Commission to amend or revoke a certificate; since the Commission has brought no charges that appellee has violated any of the terms of its certificates or operating rights as contemplated by Section 212—more specifically since the Commission denies that Section 212 applies to its action in attempting to modify appellee's certificate—no other conclusion appears admissible than that the Commission has exceeded its powers by the orders of March 4, 1946, and April 11, 1949, on reopening, which the lower court enjoined. This Court pointedly observed in its opinion in the *Seatrain* case:

“But in ruling upon its power to revoke motor carrier certificates, the Commission itself (citing *Smith Bros. Revocation of Order*, 33 M. C. C. 465) has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in § 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made.”

## VI.

**The Proposed Restrictions Would Constitute a Substantial Diminution of Appellee's Certificate and Operating Rights and Would Constitute, in Whole or in Part, a Revocation of Its Certificate and Operating Rights.**

It is abundantly evident from this record that in both the White Line and Fredrickson acquisitions appellee sought and obtained the right to carry "all-motor" freight as well as the right to carry the freight of its railroad affiliate at rail rates. Further, in the original orders of approval the rights acquired were not subject to any geographical restrictions in the form of key-points. These facts being established, it is also clear that the Commission by its reports and orders of March 4, 1946, and April 11, 1949, on reopening, has attempted to modify the acquired rights. That the proposed modifications in appellee's operating authorities would be substantial, is amply shown. The restriction in rates to those of appellee's railroad affiliate would exclude appellee from a large volume of traffic by denying to it privileges expressly granted by statute (Sections 216(c) and 217 of Part II) of publishing all-motor rates and interchanging traffic with other motor carriers. The proposed key-point restriction would impose crippling operating difficulties upon appellee; it would place impediments in those operations upon appellee's routes between Chicago, Illinois, and Omaha, Nebraska, by converting those routes into disconnected segments. The proposed changes would be a diminution of the rights which appellee has possessed from the beginning and materially impair their value to appellee.

A certificate to a common carrier of commodities generally, as appellee has been classified and has qualified under Part II of the Act, is analogous to a franchise. It is not

necessary for the purpose of this case, any more than it was necessary in the *Seatrain* case, 329 U. S. 424, to determine that such a certificate is literally a franchise. However, such a certificate has many of the indicia of an ordinary franchise. A certificate is similar to a franchise in that it is public in nature and involves important public rights and obligations, as distinguished from a license. Licenses are usually temporary, revocable, and do not include the taking or use of public property or involve the right of eminent domain. Of a different classification, however, are the franchises of public utilities, such as telephone companies, gas companies, water companies, and common carriers.

In *Trustees of Southampton v. Jessup*, 162 N. Y. 122, cited with approval in *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, the court said at pages 126 and 127

"A license is a personal, revocable and non-assignable privilege given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. (*Greenwood Lake etc. R. R. Co. v. N. Y. & Greenwood Lake R. R. Co.*, 134 N. Y. 435, 440, and cases cited.) 'Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee.' (Id.)

"A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved. (*People ex rel. Att.-Gen. v. Utica Ins. Co.*, 15 Johns, 357, 387; *Bank of Augusta v. Earle*, 13 Pet. 519, 595; *California v. Pacific R. R. Co.*, 127 U. S. 1, 40.) These definitions, while not comprehensive enough to cover all cases, are sufficient for the case in hand.

"The right in question is not a license, because it is neither temporary nor personal, as the drawbridge and roadway authorized are substantial, fixed and permanent improvements, for the benefit of defendant's lands, and assignable therewith."

A cotton gin can be of such a public nature that its right to operate is in the nature of a franchise. In *Frost v. Corporation Commission*, 278 U. S. 515 (1928), this Court considered an Oklahoma statute which declared that cotton gins are public utilities and that no one may operate a cotton gin without first securing a permit from the State Corporation Commission. In holding that such a permit is a franchise, the Court said:

"It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma Statute, is not a mere license, but a franchise, granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment. See *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9; *California v. Pacific Railroad Co.*, 127 U. S. 1, 40-41; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 328, 329; *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 64-66; *Boise Water Co. v. Boise City*, 230 U. S. 84, 90-91; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 148 Fed. 5, 10-11.

"In *California v. Pacific Railroad Co.*, 127 U. S. 40-41, a franchise is defined as a 'right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. \* \* \* No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. \* \* \* The list might be continued indefinitely.'

"Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city waterworks or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state government agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise."

In *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, the municipality by ordinance had granted to a telephone company the right to place and maintain poles and wires on the city streets. After the company had operated for a quarter of a century the city council passed an ordinance requiring that the poles and wires be removed from the streets or that the telephone company, in the alternative, pay a substantial sum to the city for its right to continue in operation. The city relied strongly, as the appellants do here, on a reservation in the granting ordinance to the effect that the ordinance might be altered or amended as the necessities of the city might demand. This Court held, however, that even such a reservation could not be relied upon to impair substantially the value of the franchise. Mr. Justice Lurton, speaking for the Court said:

"A license has been generally defined as a mere personal privilege to do acts upon the land of the

licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. See *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 134 N. Y. 435, 440; *Southampton v. Jessup*, 162 N. Y. 122, 126.

"That the grant in the present case was not a mere license is evidence from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all the police power of the city."

The Court emphasized the necessity of viewing as permanent the rights granted under franchises, saying (p. 66):

"If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment<sup>c</sup> which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien*, 111 N. Y. 1, 42, a decision accepted and approved by this court in *Detroit v. Detroit Street Railway*, 184 U. S. 368—  
"The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent

investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only."

In *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, the Court held that there is "a tacit condition annexed to grants of franchise that they may be lost by misuser or nonuser". The Court cites with apparent approval the *Owensboro* case and other cases holding that a franchise gives the grantee a perpetual and indefeasible interest, and it also quotes with approval a statement in *Louisville v. Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 659, to the effect that, "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but howsoever designated, it is property."

In *Thunder Bay Limestone Co. v. D. & M. Ry. Co.*, 294 Fed. 958 (D. C. Mich.), the court, with regard to a railroad holder of a certificate of convenience and necessity, said (p. 962):

"It has vested rights in and under such certificate of public convenience and necessity."

Here the Commission is attempting a substantial revocation as distinguished from the mere attaching of conditions to the exercise of the privileges granted by the certificate pursuant to Section 208(a) of Part II. (App. 87.) What appellee had acquired by the orders of April 1, 1938, in the *White Line* case, and of November 28, 1944, in the *Fred-*

*erickson* case were certificates conferring valuable rights. It is inescapable that those rights will be diminished by the new restrictions proposed in the reopened proceedings having for their avowed purpose limitations upon operating rights evidenced by the certificates lawfully acquired in the manner prescribed by the statute.

The Commission's powers to impose conditions are not unlimited. Justification for the Commission's exercise of its administrative processes must be found in some express provision of the Interstate Commerce Act. The Commission appeared to be well aware of this elementary proposition in *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465, when it expressed itself in this forceful language:

"The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms. *Thompson v. United States*, 246 U. S. 547; *United States v. Pennsylvania R. Co.*, 242 U. S. 208; and *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479. We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. *Wisconsin R. Comm. v. Chicago & N. W. Ry. Co.*, 87 I. C. C. 195."

## VII.

**There Are Limitations Upon the Commission's Power to Impose Conditions. Here the Commission Is Disregarding the Limitations Upon Its Power to Regulate Appellee's Service.**

In its reports and orders on reopening the Commission places much stress upon an alleged reservation of power to modify appellee's certificates. This claimed reservation has reference to the condition in the White Line order of April 1, 1938, as carried into the certificate of December 3, 1941, issued to appellee, that the authority granted shall be subject to such further limitations, restrictions, or modifications as may be found necessary in order to insure that the service shall be auxiliary or supplementary to train service. The court below concluded that the reservation would not be adequate to change or deprive appellee of its vested rights as acquired from White Lines and represented by the certificate issued to appellee. (R. 208.)

In the reopened proceedings the Commission failed to heed this limitation. It failed to note that under Section 208(a) of Part II, as qualified by Section 204(a)(1) and (6), the conditions authorized to be attached at the time of issuance of the certificate were directed to the *exercise of the privileges granted by the certificate*. The conditions contemplated by Section 208(a) of Part II are manifestly intended to be incident to the exercise of privileges granted by a certificate issued. The proposed restrictions, however, would *take away* a substantial portion of such privileges. Privileges that might theretofore be exercised would no longer exist.

Section 208(a) of Part II provides in part:

“ \* \* \* There shall, at the time of issuance and from time to time thereafter, be attached to the exercise of

the privileges granted by the certificate such reasonable terms, conditions, and limitations as public convenience and necessity from time to time require, \* \* \* and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 204(a)(1) and (6)."

Under Section 204(a)(1) and (6) (App., p. 86) it is apparent that the terms, conditions, and limitations mentioned in Section 208(a) have reference to administrative features such as adequacy of service, systems of accounts, records and reports, and procedures of a policing character.

It would do violence to the integrity of a certificate to construe the power to attach conditions to the exercise of privileges granted in such manner as to indicate an intent to clothe the Commission with a reserved power to revoke, through the imposition of new conditions under Section 208(a), a portion of an original grant. Particularly must this be so when it is remembered that Section 212(a) delineates the power of the Commission to change or revoke, in whole or in part, certificates that have been issued.

Limiting appellee to a narrow basis of rates and to a key-point operation would be directly opposed to the exercise of privileges granted by the certificates lawfully acquired. Appellee would no longer be permitted to exercise important privileges granted by its acquired certificates. In *Smith Bros.*, 33 M. C. C. 465, the Commission recognized the limitations upon its authority to modify the operating rights of a motor carrier, when it said:

"The power to attach terms, conditions, and limitations granted by the above section (Section 208(a)) is a broad one, but it is questionable whether it was intended that we should regulate service through 'terms, conditions, and limitations,' in view of the fact that in section 204(a)(1) we are given the power to 'establish reasonable requirements with respect to continuous

and adequate service.' Assuming but not determining that we can regulate service through 'terms, conditions and limitations,' even such a broad power is inadequate to permit what in effect is a modification of a separate provision of the act.

"It therefore is first necessary to ascertain whether Congress intended by the words 'terms, conditions, or limitation,' to empower us to include self-executing forfeiture provisions in certificates in view of the provisions contained in section 212(a). This section reads in part as follows:

"Certificates \* \* \* shall be effective from the date specified therein, and shall remain in effect until suspended or *terminated as herein provided*. Any such certificate \* \* \* may, upon application of the holder thereof, in the discretion of the Commission, be amended, revoked, in whole or in part or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any *term, condition or limitation* of such certificate \* \* \*." Provided, however, That no such certificate, \* \* \* shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the *term, condition, or limitation of such certificate* \* \* \* found by the Commission to have been violated by such holder \* \* \*.

"Terminate is a technical word to describe the end or termination of a period. It is defined by the New Standard Dictionary as: 'To put an end or stop to; bring to a completion, finish, to cease to be, come to an end.' It will be observed that the above section

provides only one method for terminating a certificate, and that is by revoking it.

"In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but *once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.* To hold that under section 208(a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212(a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act." (Emphasis supplied.)

As the proposed change in the operating rights of appellee would amount to a revocation of a very substantial part of the original grant, it hardly seems necessary to urge that the Commission may not, by a reservation such as the one upon which it now relies to justify its action, exert a power which the statute itself does not confer. The *only* power of modification conferred by the statute is that found in Section 212—and for the causes and upon the limitations therein set forth. *United States, etc. v. Seatrain Lines, Inc.*, 329 U. S. 424. The Commission here admits that it is not proceeding under Section 212 and maintained throughout the reopened proceeding that that section has no application. Its sole justification for the

action here proposed rests upon an alleged reservation to modify, that is, to do that which the statute itself, except within the purview of Section 212, does not permit.

### VIII.

#### **The Parker Case Is Distinguishable.**

Appellants have asserted that the proposed action of the Commission finds approval in this Court's decision in *Interstate Commerce Commission, et al. v. Harry A. Parker, etc.*, 326 U. S. 60, decided June 18, 1945. Appellee submits that that case differs in material respects from the instant proceeding. In the *Parker* case the applicant, a wholly-owned subsidiary of the Pennsylvania Railroad, sought issuance of a certificate under Sections 206(b) and 207(a) of Part II of the Interstate Commerce Act. Here, however, the proceedings involve acquisitions of existing rights, which as to White Lines, were subject to Commission approval under the provisions of Section 213 of Part II, and as to the Frederickson transaction, under that Section's re-enacted provisions in Section 5(2)(a)(b) of the Interstate Commerce Act. In the *Parker* case the Commission at the time of issuance of the certificate limited the motor carrier to service auxiliary to or supplemental of the rail service of the affiliated railroad. *Texas & Pacific M. Transport Co., Comm. Car. App.*, 41 M. C. C. 721, had in the meantime (January 21, 1943) been decided. In the *Texas & Pacific* case, *supra*, the term "auxiliary to or supplemental of rail service," was broadened to include the meaning that an affiliated motor carrier, "may not properly be a party to tariffs containing all-motor or joint rates \* \* \*." (41 M. C. C. 721, at 726.) That meaning was different from that which obtained in April, 1938, when the Commission approved appellee's acquisition of White Lines' operating rights.

In *United States, et al. v. Seatrain Lines, Inc.*, 329 U. S. 424, which was decided on January 6, 1947 (after the *Parker* decision), the Court said:

"\* \* \* The alleged authority to alter a certificate after it has been finally granted so as to limit the type of service is certainly no greater than the Commission's authority to limit the type of service when issuing the original certificate." (At page 431.)

In the *Parker* case the motor carrier accepted the grant, in the first instance, subject to the right to impose conditions. In the instant proceeding when the examiner recommended approval of the acquisition of existing White Line rights subject to a rate limitation appellee stated in its exceptions that it would not consummate the transaction if the restriction stood. As has been seen (this brief, pages 10, 11; 31, 32) the restrictions recommended by the examiner was eliminated when the Commission issued its order of approval.

When the original certificate was issued to appellee in December, 1941, (R. 40) the term, "auxiliary to and supplemental of rail service", did not encompass a rate limitation such as that expressed in *Texas & Pacific, supra*. Now to apply such a meaning would conflict with the Court's observation quoted above.

We have made the point that the proposed rate restriction under the intended condition, that appellee's service shall be limited to that which is auxiliary to the train service of its affiliated railroad, is repugnant to Sections 216 and 217 of Part II. Seemingly, this point was not before the Court in the *Parker* case, for there is no discussion of it to be found in the Court's opinion. Appellants therefore would be reading something into the Court's decision when they assert, in effect, that this decision reflects approval of a limitation as to rates, such as is here intended to be imposed upon appellee. This Court, we

maintain, did not in the *Parker* case specifically approve a limitation that would be in derogation of Sections 216 and 217 of Part II.

## IX.

### **The Legislative History Discloses That It Was the Congressional Intent That Common Carriers by Motor Vehicle Might Be Railroad-Owned.**

Appellants assert that the Commission is merely carrying out the legislative intent in its attempt to prohibit appellee from rendering an all-motor service in addition to the service which is directly coordinated with its affiliated railroad. (R. 111, 112.) Appellee submits that this intent cannot find support in the legislative history of the Motor Carrier Act—that, to the contrary, it was the Congressional intent that *common carriers* by motor vehicle may be railroad-owned. The Act was based on a draft of a bill (Senate Document 152, Appendix G; Document 89, Appendix VII, h), submitted by the Federal Coordinator of Transportation who was appointed pursuant to the Emergency Railroad Transportation Act of 1933. The draft was the result of several years of investigation and research, first by the Interstate Commerce Commission, and later by the Federal Coordinator of Transportation. The Commission had made two reports,\* in each of which it was recommended:

“That railroads, whether steam or electric, and water carriers subject to the Act should be specifically authorized to engage in the transportation of both persons and property by motor vehicle in interstate commerce.”

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\* Docket 18300, *Motor Bus and Motor Truck Operation*, 146 I. C. C. 685; Docket 23400, *Coordination of Motor Transportation*, 182 I. C. C. 263.

• See also the following reports by Federal Coordinator of Transportation: Regulation of Railroads, Senate Document 119, 73rd Congress, 2nd Session; Regulation of Transportation Agencies,

The Coordinator's draft of the bill required the issuance of a certificate of convenience and necessity as a prerequisite to performance of motor carrier service on the public highways. Section 307(a) of the draft provided that such certificate would be issued to any qualified applicant therefor if it was found that the applicant was fit, willing, and able to perform properly the service and that the service was required by public convenience and necessity. In the hearings on this bill, Frank McManamy, Chairman of the Legislative Committee of the Interstate Commerce Commission, stated that it was the unanimous recommendation of the Commission that railroads, "like anyone else," should be given certificates of convenience and necessity to operate competing bus and truck lines, "in order to coordinate the different means of transportation and get the best use out of them." (Hearings on H. R. 6836, before Legislative Committee on Interstate and Foreign Commerce, 73rd Congress, second Session, pages 16 and 22.) Commissioner Eastman explained to the Committee that his bill would permit a railroad to own bus and truck lines and to coordinate these different forms of transportation under one management. (Hearings on S. 1629, S. 1632, and S. 1635, before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Part I, page 85.)

Congress made no change in the provisions of the Coordinator's bill covering the issuance of certificates of convenience and necessity. Section 207(a) (49 U. S. C. A. 307(a)) of the Act is identical with Section 307(a) of the Coordinator's draft. It is, therefore, clear that Congress

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Senate Document 152, 73rd Congress, 2nd Session; Report of Federal Coordinator of Transportation, II. Document 89, 74th Congress, 1st Session.

See also report of Leo J. Flynn, Attorney Examiner, S. Document 43, in which it is stated: "Rail carriers should be permitted the same opportunity to engage in motor vehicle operations and upon the same terms as any other corporation or individual." O

accepted the recommendations of the Interstate Commerce Commission and the Coordinator that railroads or their affiliates should be treated "like anyone else" in the issuance of certificates.

We find this incongruous language in the report, on reopening, of March 4, 1946:

"We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstances that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. In other words a railroad applicant for authority to operate as a common carrier by motor vehicle though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negating any disadvantage to the public from this fact a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified." (R. 76, 77.)

This commentary is obviously irreconcilable with the language appearing in the original report and order of April 1, 1938, approving the White Line acquisition, as follows:

"The third argument is also untenable because, as

numerous motor-carrier competitors operate throughout the territory, there will be no restraint of competition. It may be, as contended, rail-and-highway coordination may be accomplished through use of independent truck lines. However, there is nothing in the law to prevent a railroad if it otherwise meets the proof requirements of the law, from acquiring control of a motor carrier to be used for this purpose, and we are satisfied that the proof requirements have been met in the instant proceeding." (R. 32, 33.)

Under the terms of the statute the circumstances do not justify treatment of appellee different from that accorded other common carriers by motor vehicle. It is true that where a motor carrier, such as appellee, is owned or controlled by a rail carrier additional findings were required under Section 213 of the Act (and as re-enacted in the amendment to Section 5(2)(b)), that the authority sought could be used to public advantage in the affiliated rail carrier's operations, and that the acquisition would not unduly restrain competition. Those findings were made in the original orders of approval in the *White Line* and *Frederickson* cases. Having qualified under Sections 213 and 5(2)(a)(b), appellee was entitled to exercise the rights of a common carrier as defined in Section 203(a) of Part II of the Act. *U. S. v. Carolina F. C. Corporation*, 315 U. S. 475, at p. 483; 86 L. Ed. 971, at p. 979. Under the restrictions proposed by the reports and orders on reopening appellee would be unable to exercise those rights as granted by the certificates duly acquired from *White Lines* and *Fredericksons*.

## X.

**In Revoking a Substantial Portion of Appellee's Certificate, the Value Thereof Will Be Destroyed or Materially Impaired. The Commission's Order on Reopening Therefore Would Violate the Fifth Amendment to the Constitution.**

In its complaint appellee alleged that the order here challenged violates the Fifth Amendment to the Constitution of the United States; that the certificates acquired from White Lines and Fredericksons comprised property and franchise rights; and that the order which the court below enjoined deprives appellee of substantially all of the value attributable to said certificate, thereby depriving appellee of its property in the same without due process of law and in violation of the Fifth Amendment. The purchase price of the White Line rights was \$59,400.00 and the purchase price for the Frederickson rights was \$6,500.00. Upon consummation of the White Line deal on April 5, 1938, appellee proceeded to operate and develop the White Line routes and in addition to the purchase price committed itself to large expenditures to establish suitable offices, terminals, facilities, and equipment of a value exceeding \$445,000.00. Appellee alleges that if this order should become effective, it stands to lose gross revenue in excess of a million dollars per year.

Appellee's certificate is a right with very definite value. The Commission's action, represented by the order of April 11, 1949, in revoking a substantial portion of the certificate, will destroy or materially impair its value. An individual's business is property. *State Ice Co. v. Liebmann*, 285 U. S. 262; *Jay Burns Baking Co. v. Bryan*, 264 U. S. 564; *Duplex Printing Co. v. Deering*, 254 U. S. 443; *Truax v. Corrigan*, 257 U. S. 312. A certificate

such as here involved, and the rights which it confers, is property of value: *Seatrains Lines v. U. S.*, 64 F. Supp. 156; affirmed, 329 U. S. 424; *Goncz v. I. C. Co.*, 48 F. Supp. 286; *Crescent Express Lines v. U. S.*, 49 F. Supp. 92; *City W. P. & M. Co., Inc.*, 12 M. C. C. 79. Such rights are entitled to constitutional protection. *Frost v. Corporation Commission*, 278 U. S. 515; *City of Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58.

### Conclusion.

Appellee respectfully submits that the essential facts as recited in the lower court's findings of fact (R. 213-218) have not been and cannot be refuted. They can lead only to the conclusion that the Commission exceeded the powers delegated to it under the Interstate Commerce Act when it entered its orders and reports of March 4, 1946, and April 11, 1949, on reopening, outside the scope of Section 212. The lower court's conclusions of law (R. 219-221), appellee urges, are without error and fully support that court's ultimate conclusion that said orders should be permanently enjoined. Appellee therefore prays that the judgment be affirmed.

Respectfully submitted,

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MARTIN L. CASSELL,

*Attorneys for Appellee.*

W. F. PETER,

A. B. ENOCH,

*Of Counsel.*

October, 1950.

# Appendix.

## APPENDIX.

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### DISSENTS OF COMMISSIONERS PORTER, MAHAFFIE, AND MILLER TO THE REOPENED ORDER OF MARCH 4, 1946. (R. 81.)

PORTER and MAHAFFIE, *Commissioners*, dissenting:

We concur in Commissioner Miller's separate expression, except the suggestion that authority, in the future, be limited to traffic which moves at rail rates and on rail billing. We do not agree with this because when there is a difference between motor carrier rates and rail rates, this limitation would tend to aggravate differences between those motor carriers which are subsidiaries of railroads and those which are not. In our opinion, limiting the service to rail points or points within a reasonable distance of those served by railroad, would be sufficient.

MILLER, *Commissioner*, dissenting:

Eight years ago we approved and authorized the purchase by Transit of operating rights of White Line, then claimed under the "grandfather" clause. In doing so, we found that Transit proposed to render, under the acquired rights, an all-truck service between points also served by the trains of its parent railroad as well as a truck service coordinated with that train service. There is nothing in that report limiting the operating rights to be acquired to prevent such service being rendered. That transaction was consummated and a certificate was eventually issued to Transit covering the rights, also without restriction as to the kind of service authorized. For eight years Transit has rendered motor-carrier service under those rights, without question that it was rendering the lawfully authorized service. Without affording Transit an opportunity for hearing on the question the majority now deprive Transit of its rights to continue to render the kind of service which it has been rendering by imposing restrictions like those imposed in *Kansas City Southern Transport Co. Inc., Common Carrier Application*, 10 M. C. C. 221, 28 M. C. C. 5, a proceeding arising under sec-

tion 207 of the act, including a condition limiting the service authorized to that which is auxiliary to or supplemental of, train service of the parent railroad. The majority report leaves no doubt that this restriction is intended to deprive Transit of the right to engage in operations unconnected with the rail service, of the right to be a party to tariffs containing all-motor or joint rates, and of the right to transport freight at other than the rail rates of its parent. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, decided January 21, 1943. The majority take similar action in respect of operating rights purchased by Transit from the Fredericksons pursuant to our approval, which was also granted without any condition being imposed limiting the kind of service authorized under the rights upon exercise of the purchase authority. The action of the majority, in my opinion, is arbitrary, is wholly unsupported by anything in these records, is without knowledge of the remaining available service, and is unfair to the carrier which invested its funds in these properties pursuant to our prior approval of its unrestricted operations under the rights acquired:

The justification given by the majority for the action taken is not convincing. The long quotations from the *Barker* case embrace a general discussion of the manner in which a motor-carrier subsidiary of a railroad may coordinate its operations with the train service. However, the only conditions imposed in that proceeding affecting service under the rights authorized to be acquired were the two which canceled so much of those rights as authorized operations in territory outside the natural territory of the parent railroad. Those conditions had nothing to do with the *kind of service* to be rendered. That transaction was consummated, a certificate was issued to the vendee as successor under the "grandfather" clause, without any restriction whatsoever as to the kind of service authorized under the rights, and vendee presumably has conducted an unrestricted all-motor service as authorized by that certificate. Even in the discussion in those quotations from the *Barker* case, there is nothing to indicate that the view of auxiliary and supplementary service then held was of a service limited to the transportation of rail

freight at rail rates. The phrase was not so specifically interpreted until six years later in the *Texas & Pacific* case. In not a single rail-motor acquisition case decided after the *Barker* case was any condition precedent to approval imposed which modified the acquired rights to prevent the rendition of all-motor service by the railroad subsidiary until the report of the Commission, Division 4, in *Southern Pac. Transport Co.—Pur.—Trinity M. Frt. Lines*, 40 M. C. C. 215, decided June 13, 1945, where, under the facts there existing, a condition precedent was imposed, modifying the rights to limit the service authorized solely to that which was auxiliary to or supplemental of train service within the meaning of the *Texas & Pacific* case. Indeed, on two occasions after the decision in the *Kansas City Southern* case, on petitions for reconsideration by protestants in rail-motor acquisition cases, based on the contention that the rights acquired should be restricted in a manner similar to the restrictions in the *Kansas City Southern* case, the Commission denied the petition, thus affirming the action of Division 4 in refusing to restrict the rights in that way. *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, and *Southwestern Transp. Co.—Purchase—Hill and Howe*, 37 M. C. C. 83.

The majority correctly point out that, from the date of the decision in the *Barker* case the principles there recognized and applied controlled the disposition of every rail-motor acquisition case. The point is, however, that neither in the *Barker* case nor those which followed it was any condition to approval imposed which cancelled any of the acquired operating rights so far as the kind of service authorized was concerned. Contrary to the view of the majority that the report in *Frisco Transp. Co.—Purchase—Reddish*, *supra*, marked a departure from former policy, evidenced by the *Barker* case, that report is wholly in line with the report in the *Barker* case. In both cases the only conditions imposed with respect to the rights were geographical. The majority state:

Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only territorially and not as respects the character of the

service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied.

The carriers and the public generally should not be forced to read into our reports intentions which are not clearly stated therein, or to anticipate that, years after we have given our approval without stating what we mean, we then, on our own motion, and without a hearing, cancel certain of the rights previously authorized to be acquired—on the ground that such was our intention when we first granted the authority. This applies equally to those cases wherein a condition was imposed reserving the power to impose future conditions as well as those where no such power was reserved. That condition, when used, referred vaguely to imposition of future restrictions to limit the service to that which was “auxiliary to, or supplemental of”, train service. At the time that condition was imposed the carriers had no reason to anticipate, from anything stated in the reports, that such power might, at some distant future date, take the form of depriving it of the right to haul all traffic except that of the parent railroad, should they exercise the authority granted. Particularly is this true when, even after the decision in the *Kansas City Southern* case, the Commission continued to refrain in every case from imposing conditions in acquisition cases limiting the kind of service in any way under the acquired rights. “Auxiliary and supplemental” had never been stated, in any acquisition case, to mean a service limited to that of transporting freight of and for the parent railroad, until the single recent case above cited.

We have permitted these carriers to invest their funds in acquiring definite operating rights, unrestricted as to the kind of service authorized. The “transactions”, approved under section 213 or section 5, have been consummated and there is here no longer any question of the transactions being “consistent with the public interest” or that they would “enable such carrier to use service by motor vehicle to public advantage in its operations”. These issues were fully determined in the prior reports when the applications were granted. Those findings were made on the basis of rendition of all motor service as well as a co-

ordinated service. The majority now cancel certain of the rights permitted to be acquired under those findings. No attempt is made, in taking this action, to meet the requirements of section 212(a).

It is my view that, for the future, motor-carrier subsidiaries of railroads should not be permitted, in section 5 proceedings, to acquire and to engage in unrestricted all-motor operations unconnected with the train service of their parent railroad. It is entirely proper and, I believe, necessary in the public interest, that when we permit railroads to acquire control of motor-carrier operations under section 5, appropriate conditions precedent to the exercise of the authority should ordinarily be imposed modifying the operating rights and the kind of service authorized under the rights in such a way as to prevent the motor-carrier subsidiary from engaging in all-truck service competitive with independent motor carriers. It seems to me that the imposition of a condition precedent which would require the motor-carrier subsidiary to engage only in the transportation of freight from or to stations on the line of the parent railroad, at rail rates and on rail billing, generally would suffice for this purpose. No such condition was imposed in these proceedings and we should not now, long after exercise of the authority previously granted, arbitrarily cancel certain of the operating rights permitted to be acquired, on the theory that we intended to do it at the time we approved the transactions.

**COMMISSIONER MILLER AGAIN DISSENTING, NOW TO THE ORDER OF APRIL 11, 1949, AFFIRMING THE ORDER OF MARCH 4, 1946, ON REOPENING. CHAIRMAN MAHAFFIE ALSO AGAIN DISSENTED AND COMMISSIONER MITCHELL, WHO SUCCEEDED COMMISSIONER PORTER, NOW DECEASED, JOINED IN THIS EXPRESSION. (R. 127.)**

*MILLER, Commissioner, dissenting:*

I dissent from the findings of the majority for reasons generally set forth in my dissenting expression in the prior report on reconsideration. The further hearing which has now been held resulted in no new or additional evidence, the instant decision, therefore, for all practical purposes

being a report on reconsideration only. It affords no basis for the action taken. Although our authority to impose conditions to approval of transactions under section 5 is broad, the action of the majority is not a prescription of conditions to approval of these two section 5 matters; it is a direct revocation of a portion of the certificates of The Rock Island Transit Company in a manner other than as authorized in section 212. The action is taken in order to execute a "new policy" and is not distinguishable from the action which was condemned by the Supreme Court in the *Seatrains case*.

I am authorized to state that *Chairman Mahaffie* and *Commissioner Mitchell* join in this expression.

**PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT, INCLUDING SECTIONS OF THE MOTOR CARRIER ACT, 1935.**

**UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL.**

SEC. 5. (2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms, and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(Title 49 U. S. Code, as amended by Act of September 18, 1940, c. 722, Title I, Sec. 7, 54 Stat. L. 905.)

SECTION 203(14). The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers

or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(Section 203, 49 Stat. L. 544; Section 303, Title 49 U. S. Code.)

Sec. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. \* \* \*

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; \* \* \*

(Sec. 204, 49 Stat. L. 546; Sec. 304, Title 49 U. S. Code.)

SEC. 206(a) \* \* \*

Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such

operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate.

(Sec. 206, 49 Stat. L. 551; Sec. 306, Title 49 U. S. Code.)

SEC. 208. Terms and conditions of certificate.

(a) Specification of routes and termini; extension of routes; restriction on additions to equipment. Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(Sec 208, 49 Stat. L. 552; Sec. 308, Title 49 U. S. Code.)

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(Sec. 212, 49 Stat. L. 555; Sec. 312, Title 49 U. S. Code.)

## CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL.

SEC. 213. (a) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

(1) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceeding of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and

conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, however, That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5(8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(C. 498, 49 Stat. L. 555.)

#### RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE.

SECTION 216(b). It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

SEC. 216(c). Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable and equitable divisions thereof as between the carriers participating

therein which shall not unduly prefer or prejudice any of such participating carriers.

(Sec. 216; Stat. L. 558; Sec. 316, Title 49 U. S. Code.)

#### TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE.

SEC. 217(a). Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and or express and or water, when a through-route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(Sec. 217, 49 Stat. L. 560; Sec. 317, Title 49 U. S. Code.)

**SUPREME COURT, U.S.**

Office Supreme Court, U. S.

FILED

MAR 12 1951

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1950.

**No. 25**

THE UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,

*Appellants,*

*vs.*

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
STATE OF IOWA, Ex REL., IOWA STATE COM-  
MERCE COMMISSION, AND THE OMAHA CHAMBER  
OF COMMERCE,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

**PETITION FOR REHEARING IN BEHALF OF THE  
ROCK ISLAND MOTOR TRANSIT COMPANY.**

HARRY E. BOE,  
MARTIN L. CASSELL,

*Attorneys for Appellee.*

W. F. PETER,  
A. B. ENOCH,  
*Of Counsel.*

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II. The Frederickson purchase was consummated January 22, 1945, in full compliance with the requirements of the report and order of November 28, 1944. As the report and order were not modified prior to consummation and the transaction having been closed in a manner satisfactory to the Commission the Commission thereafter is without power other than to perform the administrative duty to reissue the certificate, covering rights under an existing certificate, to which by its report and order it has said Transit would be entitled upon consummation .....	12
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950.

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**No. 25.**

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THE UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION,

*Appellants,*

*vs.*

THE ROCK ISLAND MOTOR TRANSIT COMPANY,  
STATE OF IOWA, *Ex Rel.*, IOWA STATE COM-  
MERCE COMMISSION, AND THE OMAHA CHAMBER  
OF COMMERCE,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

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**PETITION FOR REHEARING IN BEHALF OF THE  
ROCK ISLAND MOTOR TRANSIT COMPANY.**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Now comes The Rock Island Motor Transit Company  
(Transit), one of the appellees in the above-entitled cause  
and prays that a rehearing be granted, that the order re-  
versing the judgment of the 3-judge District Court and  
remanding the proceeding with directions to dismiss the  
complaint be upon further consideration vacated and set  
aside, and that the judgment of the 3-judge District Court  
be affirmed. In support thereof petitioner shows:

## **JURISDICTION.**

The order as to which a rehearing and reversal is prayed was entered on the 26th day of February, 1951. This petition for rehearing is filed within 15 days after said order was entered.

## **GROUND.**

### **I.**

With due deference to this Court, the Interstate Commerce Commission, in entering the order and issuing the certificate approving and confirming the White Line transaction, did not intend to reserve and did not reserve power to confiscate the property rights the purchase and transfer of which for valuable consideration it had authorized.

The Commission's order which the lower Court set aside and enjoined was entered March 4, 1946, almost eight years after the order of April 1, 1938, approving the White Line transaction, almost eight years after the transaction had been consummated and more than four years after the certificate of December 3, 1941, confirming the transaction, had been issued. The order of March 4, 1946, would in substance destroy the White Line operating rights acquired by Transit upon the authority of the Commission. This order is said to be valid because it is merely the exercise of the power reserved by the Commission in its order of April 1, 1938 (R. 468), and its certificate of December 1, 1941 (R. 40), entered and issued in the same proceeding. That the reservation of any such power was neither intended nor provided at the time the order was entered or at the time of the issuance of the certificate in confirmation thereof is manifest when all of the provisions of the order and of

the certificate are considered together in the light of the setting out of which they arose.

After Transit had filed its application with the Commission for authority to acquire White Line's operating rights, the proceeding was assigned for hearing before an Examiner. During the hearing and in argument Transit made its position clear that it proposed to utilize the operating rights of White Line between Omaha and Chicago in the conduct of an all-truck service restricted to points on the railroad but in addition to rather than a substitute for rail service. (Commission's report and order of April 1, 1938, by which the purchase and transfer of White Line's operating rights were authorized; R. 468, 472; 411, 412.)

After the hearing the Examiner filed a report and order recommended by him for adoption by the Commission (R. 17) in which, among other things, it is stated that applicant intends to use the operating rights acquired in serving points located on the line of the Rock Island between Chicago and Omaha for three methods of operation one of which is "an all-truck service restricted to points on the line of railroad at rates comparable with those of motor competitors." (R. 22.)

The Examiner concluded that Transit should not be granted the right to operate an all-truck service at competing motor carrier rates even if the exercise of such right was confined to transportation from and to points on the railroad. Adhering to this conclusion but otherwise accepting Transit's proposal, the Examiner recommended that the purchase by Transit of the operating rights of White Line be approved and authorized subject to the following conditions:

"that the authority herein granted (1) is subject to the limitation that applicant shall not render service from or to, or interchange traffic at, any point other than a station on the lines of The Chicago, Rock Island

and Pacific Railway Company, and shall be subject to such further limitations as it may hereafter be further necessary to impose *in order to insure that the service shall be auxiliary or supplementary to the train service of said railway and shall not unduly restrain competition*; (2) *that no truck service shall be conducted at other than rail rates*; (3) that no contract or irregular route operations shall be conducted pursuant to the rights acquired, and (4) that neither applicant nor the railroad, ~~their~~ directors, officers, or agents, shall directly or indirectly vote the stock of White Line Transfer & Storage Company, without specific authority from this Commission." (R. 24, 25; italics ours.)

Obviously it was the view of the Examiner that authority limited only to the performance of an auxiliary or supplementary service did not forbid but would permit the use by Transit of White Line's operating rights in the performance of service as a common carrier by motor vehicle at truck rates, particularly if such common carrier service is confined to transportation between points on the railroad, and if interchange of traffic in connection with such common carrier service is so confined. An additional limitation was essential and in order to prohibit the use by Transit of White Line's operating rights in the performance of any common carrier service, it was recommended that a further condition be imposed, namely, condition (2) above, "that no truck service shall be conducted at other than rail rates."

Transit filed timely exceptions to the Examiner's recommended report and order. In its exceptions Transit went much further than merely to object to the imposition of a restriction that would prohibit the use of White Line's operating rights in performing a common carrier service. Transit made it clear to the Commission that it would not acquiesce in the imposition of such a condition; that the imposition thereof would divert such a large volume of

business then being handled by White Line as to vitally impair the value to it of White Line's operating rights; and that if acquisition was made subject to such a condition, Transit would not proceed to consummate the transaction. (R. 454, 457, 466.)

After consideration of the Examiner's recommendations together with the exceptions thereto filed by Transit, and when the Commission came to hand down its report and order of April 1, 1938 (R. 468), the Commission approved the acquisition by Transit of White Line's operating rights, but stated that its conclusions differed somewhat from those recommended by the Examiner. The significant difference between the conclusions of the Examiner and the conclusions of the Commission is that the stumbling block to consummation of the transaction proposed by the Examiner was eliminated by the Commission. The Commission did not adopt the Examiner's recommendation that no truck service be performed at other than rail rates. It did not subject its approval of acquisition to any such condition. The following are excerpts from the Commission's report which is made a part of the order:

"If the instant application is approved, applicant would use only such common-carrier operating rights as White Lines may have over the route between Omaha and Chicago, 500 miles, and over two short branch routes to Muscatine and Cedar Rapids, and agrees to abandon claims to all other operating rights of White Lines, so far as the instant transaction is concerned, including any duplication in rights over the routes to be retained. Between East Moline, Ill., and Omaha, 300 miles, the highway closely parallels the railroad. Between the former point and Chicago the maximum point of divergence between the highway and railroad is approximately 25 miles. Service is not to be provided to any point not also a station on the railroad." (R. 471.)

"In an effort to retrieve some of the substantial

volume of less-than-carload freight diverted from the railroad to competing highway carriers, and to improve the railroad's service to the public, applicant proposes to utilize the operating rights of White Lines between Omaha and Chicago in the conduct of three distinct types of service, (1) a coordinated rail-truck service, to be auxiliary to existing all-rail service by moving merchandise cars to certain concentration or set-out points, and then making distribution by truck; (2) an all-truck service on short hauls between stations, where feasible and economical, as a substitute for rail service; and (3) *an all-truck service restricted to points on the railroad, but in addition to rather than a substitute for rail service.*" (R. 472; italics ours.)

"We conditioned our authorization in the *Barker case* to exclude the privilege of rendering service from or to, or the interchanging of traffic at, any point not a station on the railroad, and in general indicated the scope of approved and disapproved operations. Many of the operating rights which would accrue to applicant under the instant transaction, if no conditions were imposed, are of a character which we disapproved in the case cited. Applicant concedes this fact and, as heretofore stated, is agreeable to abandonment of all rights except common-carrier rights between Omaha and Chicago and similar rights over branch routes to Muscatine and Cedar Rapids, and the 'Grandfather' applications of White Lines will be considered as amended accordingly." (R. 473.)

In its report and order of April 1, 1938, approving acquisition by Transit of White Line's operating rights, the Commission subjected such approval to the following conditions:

"(1) that the said railroad shall promptly take such steps as are legally possible and necessary to acquire, subject to our approval, from Rock Island Improvement Company all interest which the latter owns in The Rock Island Motor Transit Company; (2) that applicant shall not, if the authority herein

granted is exercised, render service from or to, or interchange traffic at, any point other than a station on the lines of said railroad; (3) that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition; and (4) that applicant shall not, without our authority, vote any of the stock of White Line Transfer & Storage Company, or exercise any control over its affairs in any manner whatsoever." (R. 476.)

It will be noted from condition (2) above that, in the exercise of White Line's operating rights, Transit was not prohibited from interchanging traffic at points on the railroad. The right to interchange at such points was thus recognized. Such recognition is wholly inconsistent with any intention to deny Transit the use of White Line's operating rights in performing service as a common carrier by motor vehicle. If there had been any intention to deny Transit the status of a common carrier by motor vehicle in performing a part of its operations, and that intention had been carried out, there was no necessity to consider any phase of the interchange problem.

In compliance with the Commission's order (R. 479, 480) Transit, at the time the White Line transaction was consummated, adopted and made its own the common carrier rates of White Line then on file with the Commission. (R. 501.) The Commission not only authorized Transit to engage in transportation as a common carrier by motor vehicle. (R. 41.) The Commission specifically required Transit to observe motor common carrier tariffs and rates.

The certificate of December 3, 1941 (R. 40) evidenced the authority of Transit to engage in transportation as a common carrier by motor vehicle subject to conditions among which is the condition (R. 43) that the right is reserved

to make any further limitations which the Commission may find necessary in order to insure that the service shall be auxiliary or supplementary to train service and shall not unduly restrain competition. The certificate also imposed the condition (R. 45) that the holder thereof "shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted and the failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

A determination of the question whether or not the Commission reserved power to destroy the subject matter of a transfer which it theretofore had authorized and confirmed should depend on what the Commission's intention was at the time the transfer was authorized or certified. What its intention was is expressed in the instrument of approval or of confirmation or in both such instruments. If this Court is not sure what the Commission intended or meant by the use of the phrase "auxiliary or supplementary" at the time the certificate issued, an intention on the part of the Commission to reserve such destructive power by the use of that phrase should not be assumed or implied, in particular because the setting upon which the order and certificate rest and other provisions of the order and certificate all point directly to the contrary. It should be recalled in this connection that because of the firm objection by Transit the Commission declined to impose the condition recommended by the Examiner which clearly would have prohibited truck service at motor carrier rates. Transit says respectfully that the intention to make any such reservation of power is not expressed in either instrument, that it ought not be implied or supplied gratuitously and that such power was not reserved.

Although the certificate as well as the order made the authorized operation subject to such further limitations "as we may find it necessary to impose or to make in

order to insure that the service shall be auxiliary or supplementary to the train service \* \* \* and shall not unduly restrain competition", (R. 43) it should be emphasized that both the certificate and the order also authorized transportation as a common carrier by motor vehicle and in particular that the certificate required Transit to "render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, \* \* \*." (R. 45.) Thus, it was recognized at the time of the order and of the certificate that common carrier service by motor vehicle at motor rates, as a part of Transit's authorized operations, was an auxiliary or supplementary service and would not unduly restrain competition. This interpretation is confirmed in expressions in other Rock Island cases by some of the Commissioners.

In *Kansas City Southern Transport Company, Inc.*, Common Carrier Application, 28 M. C. C. 5, the applicants were railroads or companies subsidiary to or affiliated with railroads. The Chicago, Rock Island and Pacific Railway Company was one of such companies but not named in the title as it was a consolidated proceeding. The Commission, in its report on oral argument and reconsideration, January 24, 1941, made the authority therein granted subject to conditions among which was condition (1) reading as follows:

"1. The service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, its rail service."

Commissioner Lee dissented in part, and Commissioner Rogers concurred in the dissenting expression. Commissioner Lee said at page 24:

"The result is that they are granted authority to engage in motor-carrier operations and to furnish motor-carrier service which are not coordinated with or in any wise tied into rail operations or rail service

but which, on the contrary, will duplicate the operations and the service provided by existing motor carriers and found to be adequate to fill the public need. In making this statement I have not overlooked the fact that the instant report retains condition 1 without change in text. It is clear, however, from the views expressed therein that the meaning intended to be accorded to that condition nullifies its restrictive effect to such an extent that the result stated above correctly describes the authority granted."

In *Rock Island Motor Transit Company Extension of Operations*, 33 M. C. C. 349, May 6, 1942, the authority therein granted to a railroad affiliate as a common carrier by motor vehicle was subjected to conditions among which was condition (1) reading as follows:

"1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the railway."

The expression of Commissioner Rogers dissenting in part is as follows:

"In No. MC-29130 (Sub-No. 2), it is my opinion that public convenience and necessity has not been shown to justify the railroad subsidiary to conduct an all-out motor-carrier service between Chicago and Silvis which, when connected with its Silvis-Omaha route, permits such a service from Chicago to Omaha. I would impose restrictions designed to limit the operation to a service truly auxiliary to or supplemental of the railroad service."

The report and order of the Commission in the Frederickson proceeding, November 28, 1944 (R. 573), is further confirmation that, in the *White Line* case, common carrier service, as a part of Transit's authorized operations, was recognized as an auxiliary or supplementary service and

would not unduly restrain competition. In the Frederickson report and order the Commission said:

“Certain of Transit’s present freight operations are subject to the limitation that service shall be solely that which is auxiliary to and supplemental of the train service of the railroad and either that freight so handled shall have any immediate prior or subsequent haul by the railroad, or that it shall be transported from, to, or between more than one of specified key-points. *However, its (The Rock Island Motor Transit Company) route between Atlantic and Omaha, Nebraska, over U. S. Highway 6, serving all points which are stations on the railroad is part of a route to and from Chicago, Illinois, via Des Moines, acquired pursuant to authority granted (italics ours) in Rock Island M. Transit Co.—Purchase—White Line M. Frt., 5<sup>th</sup> M. C. C. 451, and is not so restricted.*” (R. 575; italics ours.)

“*As stated, Transit is already authorized to render an unrestricted all-truck service between Atlantic and Omaha over U. S. Highway 6 as part of its operations between Chicago and points west of Omaha.*” (R. 579; italics ours.)

In the White Line proceeding the power reserved by the auxiliary or supplementary service phrase was not the power to destroy and undo that which had been approved. The power thereby reserved was the power to make sure that the authorized service continued to be an auxiliary or supplementary service and to make sure that competition would not be unduly restrained by the future conduct of operations. It was a power to be exercised, as stated in the condition, when found to be necessary. The Commission should be apprised by evidence of such necessity. No further evidence has been introduced in this case since the original record was closed.

Thus, the Commission to date has made no finding, upon evidence, of necessity for action on its part to make

sure of anything. Transit states that it is faithfully observing the provisions of the order and of the certificate. While the Commission does not know this of record, the significant fact is that, of record, the Commission is not in possession of any facts to the contrary.

## II.

The Frederickson purchase was consummated January 22, 1945, in full compliance with the requirements of the report and order of November 28, 1944. As the report and order were not modified prior to consummation and the transaction having been closed in a manner satisfactory to the Commission, the Commission thereafter is without power other than to perform the administrative duty to reissue the certificate, covering rights under an existing certificate, to which by its report and order it has said Transit would be entitled upon consummation.

The Fredericksons owned and possessed certificates issued under the "grandfather clause." The certificates and the rights authorized under them were in existence on and prior to March, 1943, and the question of public convenience and necessity had been disposed of. In August, 1943, Transit and the Fredericksons entered into an agreement for the transfer by Fredericksons to Transit of certain properties, and of the common carrier over-the-road motor carrier rights, authorized by these certificates. This transfer agreement was subject to the Commission's approval. After application for approval had been filed and after hearing, the Commission handed down its report and order of November 28, 1944. (R. 573.) The Commission thereby authorized the transfer, finding, among other things, that the purchase of the operating rights will be consistent with the public interest and not unduly restrain com-

petition; that, upon consummation, Transit will be entitled to a certificate covering the rights authorized to be purchased; and that said rights are authorized to be unified with rights otherwise confirmed in Transit, with duplications eliminated.

The "grandfather" certificates obviously did not contain the phrase "auxiliary or supplementary", nor did the Commission employ that phrase in its report and order. The purchase by Transit was authorized subject to the terms and conditions set out in the findings of the report. Neither in the terms and conditions, nor in the entire order of which the report is made a part, is there any reservation of power, specifically or otherwise, to revoke the whole or any part of the authority granted. In particular, there is no such reservation of power for exercise after consummation of the transaction in full compliance with the Commission's requirements.

The order required of the parties or of Transit that, if the parties desired to consummate the transaction, they should (1) notify the Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with Sections 215 and 217 of the Interstate Commerce Act, and with the rules, regulations and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place; and that Transit submit related journal entries. (R. 581, 582.) Further, the order provided that **unless the authority therein granted is exercised within 180 days it shall be of no further force and effect.** (R. 581.) Thereafter the Commission was notified in writing that the parties desired to consummate the transaction, and by later notice in writing that the consummation date would be January 22, 1945. (R. 582, 583, 584.) On January 22, 1945,

the Commission was notified in writing that the transaction had been consummated January 22, 1945, that Transit had taken over the operation of the several routes involved, that Transit had made compliance with Sections 215 and 217 of the Act, and that journal entries would be submitted within the next 10 days. (R. 586.) In accordance with the requirements of the Commission, Transit adopted as its own Frederickson's motor carrier rates. On January 25, 1945, the Commission acknowledged receipt of this notice **and stated its records were being posted accordingly.** (R. 587.)

The general rules and orders of the Commission in motor carrier acquisitions contemplate that consummation shall precede the issuance of a certificate. Otherwise there might be a certificate outstanding to which, without consummation, the holder would have no right to possess. Consummation prior to certificate is confirmed by the Commission's long established practice in such cases, and in the *Frederickson* case the order recites that if the transaction is consummated, Transit *will be* entitled to a certificate covering the rights granted. Thereby the Commission imposed upon itself an obligation, intended to be relied upon, to issue a certificate covering the rights granted, conditioned only upon consummation of the transaction. Consummation took place in reliance upon the fulfillment of this obligation.

Upon consummation in accordance with the agreement and in the manner approved by the Commission, the position of the parties changed irrevocably. The rights and titles involved in the transfer vested and the transaction was closed. Thereafter restoration of prior status may not be enforced by either party against the will of the other, even with the aid of any action the Commission might take. Fredericksons received the money paid for

the property and rights acquired by and transferred to Transit with the Commission's approval, but the Commission, after authorized consummation, would destroy that for which payment has been made. Admittedly the Commission did not reserve any such power in its report and order.

Whatever power the Commission had to modify the provisions of the order prior to consummation, was lost after consummation had been effected and the position of the parties had changed irrevocably. After consummation, there remained with the Commission but the performance of an administrative and ministerial act which by its order it had undertaken to perform, and that act was to issue a certificate covering the existing rights granted to which it said Transit would be entitled upon consummation. The fact that there remained the performance of this ministerial act ought not be held to confer upon the Commission an unconscionable power to revoke the authority it had granted and to escape the fulfillment of an obligation which it said Transit was entitled to have fulfilled.

The order authorizing the Frederickson transaction (R. 573) was final in that a District Court, 3 judges, would have had jurisdiction to hear a complaint asking that it be enjoined and set aside. *U. S. v. Carolina Carriers*, 315 U. S. 475. A protesting intervenor, prior to consummation, could have filed such a complaint and been heard even though a certificate had not been issued. Such a party desiring to go to court would not be wise to wait until a certificate had been issued or, for that matter, until after consummation.

The Court suggests that, before consummation, Transit could have requested of the Commission a statement of the terms of the proposed certificate and that doubtless the request would have been complied with. Transit had the

Commission's report and order stating that the purchase is approved and authorized subject to the terms and conditions set out in the findings, and that, if the transaction is consummated, Transit will be entitled to a certificate covering the previously-described rights granted. In its report the Commission stated that Transit's operations between Omaha and Des Moines with which Frederickson's operations were to be combined was an unrestricted operation (see quotations from the report, *supra*) and thereby clearly indicated that the operations under the Frederickson's certificate would likewise be unrestricted. The report and order constituted a statement of the terms and conditions of the certificate the Commission said Transit was entitled to receive. It would have been discourtesy to ask the Commission if it really meant what it had said. But if at the time Transit did not have confidence in the Commission's commitments by report and order, how could Transit place any reliance upon subsequent gratuitous statements of much less dignity?

It is also suggested that the closing could have been made by escrow. This would have required not only an application to modify and a modification of the original order but as well the Commission's approval of the escrow agreement. But the real obstacle to such a procedure is that the seller wants his money when the transaction is consummated and no doubt would not enter into any such arrangement. He may want to put the money in another business and is unwilling to have it tied up in escrow for an indefinite period during which the purchaser has possession of and is exercising and using his property rights and his property. In the White Line case the certificate came down more than 3 years after the Commission's report and order. As to the suggestion that the closing and the issue of the certificate could have been made simultaneously, the fact is that at the time application was filed and prior

thereto it was not the practice of the Commission to handle motor carrier acquisitions in that manner. In the Erickson case the procedure followed established practice. Moreover, the order provided for the certificate after consummation. Even after the report and order, the parties were not obliged to consummate the transaction which had been approved, and the Commission would not know at the time of its order whether or not consummation ever would be effected.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a rehearing be granted, that the judgment reversing the judgment of the 3-judge District Court and remanding the proceeding with directions to dismiss the complaint be upon further consideration vacated and set aside, and that the judgment of the 3-judge District Court be affirmed.

Respectfully submitted,

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